

The WTO dispute settlement system as a legal impediment to Iran's accession on the WTO

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The WTO Dispute Settlement System as a Legal Impediment to Iran's Accession to the WTO

Siamak Amoozeidi

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The WTO Dispute Settlement System as a Legal Impediment to Iran's Accession to the WTO

DISSERTATION

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by

Siamak Amoozeidi

Supervisor

Prof.dr. Peter L.H. Van den Bossche

Co-supervisor

Dr. Stefan Weishaar (University of Groningen)

Members of the Degree Committee

Prof.dr. René de Groot (Chairman)

Dr. Iveta Alexovicová

Prof.dr. M.J. Shariat Bagheri (University of Judicial Sciences and
Administrative Services, Tehran, Iran)

Dr. Werner Zdouc, (WTO, Geneva, Switzerland)

To my dad and mom

And my sons:

Mohammad Hossein and Mohammad Sadegh



Acknowledgements

When I first reached Maastricht in September 2008, I was full of hope. I had passed almost ten years of working as a Legal Advisor in several governmental institutions and the private sector. I was familiar with Iran's legal system but could not understand the main reason why Iran could not resolve its international law issues. There was mutual distrust which sometimes seemed to hinder a common understanding between Iran and some Western countries. But whether there was any legal reasoning for this distrust could not be recognized through the domestic law mechanisms. Therefore, I decided to get a better understanding of the Western countries' legal reasoning approaches. That is why I started my PhD in Maastricht under the supervision of a highly qualified scholar in international economic law. At the beginning, my thesis was about the WTO dispute settlement system. However, after the first year I changed my research topic to what has been a big issue for Iran in international trade since 1990s. Then, I rearranged my studies on 'the WTO dispute settlement system as a legal impediment to Iran's accession to the WTO'. By starting the new topic, Dr. Stefan Weishaar who since beginning of my stay in the Netherlands has been a very helpful friend joined the supervision team. However, due to being appointed as a WTO Appellate Body Member, Professor van den Bossche moved to Geneva. To me, the lack of physical contact with Prof van den Bossche in Maastricht was a big concern, though he has always been accessible.

During my stay in the Netherlands, sometimes my family and I experienced a few instances of unfriendly behaviour by a part of the social community. The issues which even though psychologically were harmful for a member of the minority group, they were not substantially different from what Iran has been experiencing for decades in international community. Although there was not any official support to redress the imposed pressure, there have always been nice words from my supervisors and some faculty members to avoid lonely feelings.

Over recent years, I did my best to write about the legal system of a country with several thousand years of civilization. A country whose domestic system

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has not adequately been identified and recognized by the international community. Years of working in Iran's constitutional institutions were helpful to clarify Iran's constitutional system, multilateral agreement adoption process rules and legal methods which, if properly used, would offer solutions for Iran's major issues in international law. I hope that the discussed methods and mechanisms in my research can be taken into closer consideration when addressing international political and legal controversies over Iran, including Iran's WTO accession process problems.

I need to thank Mr. Habibollah Shamloo, the best Iranian constitutional law expert who taught me precious law technics during the time I was working in the National Expediency Council. His remembrance will forever stay with me. Then, I need to thank my friends in Europe and in Iran who supported me in accessing the documents required for my PhD studies and assisting me to resolve a lot of issues.

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Siamak Amoozeidi

Maastricht, the Netherlands

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Introduction

In 1996 Iran applied for accession to the World Trade Organization (WTO) and it took the country until 2005 to receive the status of observer. To date, Iran is still at the beginning of its accession process to the WTO. There are several factors which have contributed to the prolongation of the accession process for Iran. They are mostly not related to trade issues. To accelerate Iran's accession process, the impeding factors should be recognized and removed. This is why research on the impediments of Iran's accession is important and can lead to the promotion and facilitation of Iran's multilateral and bilateral negotiations to join the WTO. It bears mentioning that among the impeding factors are some important legal ones.

This research is limited to the examination of legal impediments to Iran's accession to the WTO. This is because other impediments (economic and political) can be removed by policy changes. Iran's legal impediments will require a change in the law and, in some cases, changes in the Constitution. Change in the Constitution would only be required if the legal impediment would relate to a constitutional provision. The legal impediment that will be discussed in this dissertation relates to Iran's constitutional requirements related to dispute settlement that are stated in Principle 139. To remove this legal impediment, a constitutional revision would be required, which is unlikely to be achieved easily. Even if some progress has been made in Iran to remove the trade impediments, the legal impediments are currently still neglected or not sufficiently analyzed, neither inside nor outside the country.

This dissertation first introduces the WTO accession process and how far Iran is in this process. There is a rule in the WTO accession procedures (the 'single undertaking' principle) which requires an acceding country to accept all the multilateral agreements annexed to the WTO Agreement.¹ It is discussed in chapter two that the WTO Dispute Settlement System (DSS) has compulsory jurisdiction. Under this compulsory jurisdiction, Iran's

¹ Article II:2 of the WTO Agreement states: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.'

participation in WTO covered disputes with other WTO Members is compulsory. However, as it will be discussed in this dissertation, under Principle 139 of Iran's Constitution, participation in international dispute settlements on state and public properties² requires the Parliament's authorization. This would result in a conflict between Iran's Constitution and the WTO DSS. Whether this can impede Iran's WTO accession and, if so, how this legal impediment can be removed are the main discussion points in this dissertation.

It is worth mentioning that, for almost 10 years, the author has worked in several of Iran's constitutional institutions as a legal expert. First, he worked at the headquarters of the Judiciary. Subsequently, he worked for a number of years for Iran's National Expediency Council. At the same time, he gave legal advice to the Parliament with regard to several governmental bills and parliamentary legislation drafts. Later he worked for the Guardian Council, the Centre for International Legal Affairs (CILA) of the Executive, and finally in the Oil Ministry. His work experience, from the above-mentioned institutions and the relevant organizations, allows him to give a practical assessment of what solution could really allow Iran's constitutional institutions to adopt an international agreement, such as the WTO agreements, while being in line with the Constitution.

What the author has learnt from legal experts working within Iran's legal system cannot be accessed easily through academic writings, which are based on legal theory and may therefore not offer a full understanding of the reality. Complementing the theoretical insights with practical experiences in this dissertation will provide a more feasible solution to remove the legal impediment which will be discussed here.

² Some disputes under WTO law must be considered to be disputes concerning state and public property. A dispute about the level of import duties can probably quite easily be regarded as a dispute concerning state and public property, as would a dispute regarding internal taxation on imported products. But there can be other disputes that would not be considered to be disputes regarding state and public properties. With the accession of Iran to the WTO, all WTO disputes, including those on state and public property, should be taken to the WTO DSS. However, to participate in state and public property disputes, Iran's Government needs an authorization from the Parliament, which is in conflict with the DSS compulsory jurisdiction.

This Introduction includes three parts: (I) background; (II) research questions and methodology; and (III) the research structure. The background section contains a brief chronological presentation of the history of Iran's accession negotiations to the World Trade Organization and some of Iran's accession impediments. Thereafter, the research questions which are addressed in this dissertation are defined and the applied methodology is outlined. Finally, the structure of the remaining chapters is presented in the last section.

1. Background

On 1 January 1995 the World Trade Organization (WTO) was established. This organization 'provides the common institutional framework for the conduct of trade relations among its Members in matters related to its covered agreements.'³ The WTO agreements cover three main fields: trade in goods (General Agreement on Tariffs and Trade: GATT 1994), trade in services (General Agreement on Trade in Services: GATS) and intellectual property rights (Trade Related Aspects of Intellectual Property Rights: TRIPS). These agreements, as well as, *inter alia*, more than 12 agreements on specific aspects on trade in goods and the Dispute Settlement Understanding were attached to the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement). On 1 January 1995, when the WTO Agreement entered into force, the WTO counted 128 Members. It currently has 164 Members.⁴

Iran applied for accession to the WTO in July 1996.⁵ Iran's request was put on the agenda of the General Council. However, the consensus-building attempts in the General Council to decide on Iran's request failed more than 20 times. Finally on 26 May 2005, through a decision made by the General Council, the negotiations on the accession of Iran were formally started with the establishment of a working party on Iran's accession. At the same time, Iran was granted observer status in the WTO.⁶

³ Article II:1 of the WTO Agreement.

⁴ Until 1 July 2016 there are 164 members in the World Trade Organization, for further information see: <http://www.wto.org>, last visited 01-07-2016.

⁵ WTO Document no. WT/ACC/IRN/1.

⁶ See: http://www.wto.org/english/thewto_e/acc_e/ai_iran_e.htm, last visited on 01-08-2016.

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In November 2009, Iran submitted its Memorandum on the Foreign Trade Regime to the WTO which was circulated among the WTO Members by the Secretariat. A Memorandum on the Foreign Trade Regime is a formal report from an acceding country to the WTO on its domestic economic and trade regime. The WTO Members' questions on Iran's Memorandum were sent to Iran in February 2010. In November 2011, Iran's answers to the questions were submitted to the WTO. It bears mentioning that the WTO working party to examine the Iran's application has not yet met and its Chairperson has not yet been appointed by the WTO General Council.⁷

Under the WTO rules on the accession process, the mandate of an accession working party is to check whether the applicant country's regulations and practices affecting international trade are fully consistent with WTO law. In addition, and in parallel with the work undertaken by the working party, individual WTO Members will engage in bilateral talks with the applicant country on tariff rates and specific market access commitments as well as other trade-related issues. When the bilateral negotiations and the multilateral talks are concluded, the working party sends its report and a draft protocol of accession (including lists of the applicant country's commitments) to the General Council. In practice, the General Council can only adopt a decision on a country's accession if there is consensus on such accession.⁸

The difficulties of Iran's accession are due to domestic and external problems which have played an important role in prolonging its accession process to the WTO. To accelerate Iran's accession process to the World Trade Organization, Iran needs to overcome all existing impediments, including the legal ones. There are some legal impediments to Iran's accession which should be recognized and then removed before and during the multilateral and bilateral negotiations. It bears noticing that most non-trade impediments,

⁷ WTO Accessions 2015 Annual Report by the Director- General, WTO Documents: WT/ACC/25, WT/GC/174, WT/MIN(15)/7, 16 November 2015.

⁸ Decision-Making Procedures Under Articles IX and XII of the WTO Agreement, Statement by the Chairman, 24 November 1995, WTO document WT/L/93, www.wto.org.

such as political impediments, are not easily resolved but they may be resolved over time.⁹

Independent of the political situation, a legal analysis of the obstacles for WTO accession is therefore most valuable. This research is restricted to the Iran's legal framework and aims to identify and resolve one of the important existing domestic legal impediments for WTO accession, which cannot be resolved through conventional methods such as the amendment or adoption of laws and regulations. Under Article XVI:4 of the WTO Agreement, all of Iran's laws, legislation and administrative procedures, including its Constitution, must be in line with the WTO agreements.

I. Research Questions and Methodology

This section presents the three research questions addressed in this dissertation and the methods chosen for responding to each of them.

The dissertation analyzes whether there is a legal conflict between Iran's constitutional system and the WTO DSU that impedes Iran's accession and how it could be solved.

This meta-research question is subdivided into three sub-questions:

1. Is there any legal impediment resulting from a legal conflict between the WTO DSU and Iran's constitutional system with regard to Iran's accession to the WTO?
2. Can this legal impediment (resulting from the conflict) be removed through legal interpretations of the Constitution or current legal practice?

⁹ Since 2003, the EU High Representative has led diplomatic efforts between the P5+1 (the UN Security Council's five permanent members: China, France, Russia, the United Kingdom, and the United States; plus Germany), the European Union and Iran which led to the conclusion of the Joint Comprehensive Plan of Action on Iran's nuclear program (JCPOA) in Vienna on 14 July 2015. The JCPOA ensures that Iran's nuclear program is exclusively peaceful. This deal was endorsed by the UN Security Council resolution S/RES/2231. This deal resulted in lifting most nuclear related sanctions against Iran which have been the most important external problems of Iran in international trade. See <http://www.securitycouncilreport.org/un-documents/iran>, last visited 1-10-2016.

3. If not, how can it be removed?

The first research question addressed is whether there is any legal impediment resulting from a conflict between Iran's constitutional system and the WTO Dispute Settlement Understanding (DSU) that can impede Iran's accession to the WTO? It bears mentioning that the WTO Dispute Settlement System (DSS) is examined because it includes the legal procedural rules on dispute settlement. Other WTO agreements mostly contain substantial rules on trade which are beyond the limited scope of this research. In addition, as discussed in this research, there is a legal impediment resulting from a conflict between Iran's constitutional rules on international dispute settlement and the DSU. This impediment cannot be removed through usual amendment mechanisms. Amending Iran's Constitution can be achieved through a long and very complicated procedure.

There are many books¹⁰ and essays¹¹ by scholars with regard to Iran's accession process which can be helpful for Iran's accession negotiators. The existing literature focuses on how the negotiators and other relevant experts analyze Iran's impediments to acceding to the WTO and which information is available to them and which methodology and approaches can best be used to facilitate accession. So far there is virtually no research assessing the

¹⁰ The books such as: Institute for Trade and Research, *Economic Development Strategy of I.R. Iran and Accession to the WTO-Opportunities and Challenges* [راهبرد توسعه اقتصادی [موسسه مطالعات و [ج.ا.ایران و عضویت در سازمان جهانی تجارت (2004), p. 683 and Z. Abbassi, *Identifying Inconsistent Non-Tariff Barriers of Iran Trade Policy with WTO Rules and Proposing to Change them into Tariffs* [شناسایی موانع غیر تعرفه ای متناقض با الزامات در سیاست تجاری ایران و پیشنهاد تبدیل آنها به تعرفه معادل] (The Institute for Trade Studies and Research [موسسه مطالعات و پژوهش های بازرگانی] (2011), p. 204, etc.

¹¹ Essays such as: F. Mojaver Hosseini and F. Fayazmanesh, "Accession of the Iranian Economy to the World Trade Organization: A Quantitative Appraisal" [برآورد اثرات بخشی فصلنامه پژوهش های [الحاق ایران به سازمان تجارت جهانی] *Quarterly Iranian Economic Research* (2006), pp. 31-64; F. Mohaqeqzadeh, "Consequences of Iran's Accession to the WTO on Insurance Industry" [اثر الحاق ایران به سازمان جهانی تجارت بر صنعت بیمه] *Iranian Journal of Insurance Research* (2005), pp. 61-86; M. Atrak, "Iran's Accession to the WTO and its Consequences on Iran's Banking System" [پیوستن [مجله برنامه] *Barnameh Journal* (2003), pp. 14-15; A. Dehqani, "Consequence of Iran's Accession to the WTO on Industry Sector of Iran" [تأثیر عضویت در سازمان تجارت جهانی بر بخش صنعت ایران] *Nameye Mofid Journal* (2009), etc.

importance of Iran's legal impediments. So far it is assumed, on the basis of the experience of several WTO acceding countries¹² that, if there are some inconsistencies between an acceding country's legal system and the WTO agreements, the domestic system should change to be totally compatible with WTO law. If a country's legal system contains inconsistencies which are deeply rooted in its culture and civilization, removing these inconsistencies (as the easiest and also the most common solution for the WTO acceding countries) can bring about problems for that legal system which may have a negative impact on the country.

The second research question addressed in this dissertation is whether it is possible to overcome the legal obstacle identified by means of the available legal interpretations or current legal practice. This question is approached by first clarifying the various aspects of the conflict between Iran's constitutional rules on dispute settlement and the WTO DSU. Subsequently different legal interpretations are used to analyze Principle 139 of Iran's Constitution and its enforcement.

The third research question addressed in this dissertation analyzes whether there are legal solutions other than the legal interpretations, which were discussed in the framework of the second question, to remove the legal impediment without changing the spirit of the Iranian legal framework.

To answer this question, several solutions based on international law, WTO law and Iranian law are examined. Some of the solutions have already been applied in practice with regard to similar conflicts between Iran's legal system and the rules of a number of bilateral and multilateral agreements.

It bears mentioning that the main focus of this dissertation is to remove the legal impediments to Iran's WTO accession in its adoption process (by Iran's constitutional institutions). Even though, in practice, the solutions that remove the legal impediments would also remove the legal conflict. In other words, if the suggested ways remove the legal impediment from Iran's WTO accession, practically there would not be any legal conflict (between the WTO

¹² For further information, see chapter seven, section 7.5.3. (Similar Experience of Other Countries in Accession to the WTO).

law and Iran's domestic law) if a dispute would be undertaken against Iran before the WTO dispute settlement system.

The methodology of this research is based on hermeneutic (interpretation, argumentation) and evaluative (testing whether rules work in practice) approaches. To remove the legal impediment from Iran's WTO accession, the legal interpretations of Iran's Principle 139 –which is in conflict with the WTO dispute settlement system – are examined. Thereafter, practical solutions are suggested and evaluated on the basis of a legal analysis. In doing so, first the main cause/origin of legal conflict between WTO law and Iran's legal system is recognized. Then, the practical solutions are suggested through analyzing the relevant legal interpretations and the enforcement of Principle 139 by Iran's constitutional institutions and also international tribunals.

II. Structure of the Research

The research questions are addressed in seven chapters. The first chapter is on the WTO accession process. The WTO accession process is unique for each applicant country. However, there are some general substantive and procedural rules to be followed in bilateral, multilateral and plurilateral discussions/negotiations. These rules are introduced in the first chapter. Also, the current status of Iran's WTO accession process, as well as its accession problems, are addressed. One of the general problems/obligations related to joining the WTO is the single undertaking principle. Under this rule, an acceding country must accept *all* WTO multilateral agreements. Therefore, if the accession applicant has problems with an agreement, it cannot opt-out of that agreement.

The second chapter discusses the WTO Dispute Settlement System (DSS). It will be discussed that the compulsory jurisdiction of the DSS requires that if a complaint is taken to the DSS against a WTO Member, the responding party cannot avoid participating in the dispute settlement process. This is in conflict with Iran's constitutional requirements on international dispute settlement. Under Principle 139 of Iran's Constitution, in order to resolve a state and public dispute in international systems, the Parliament's authorization is required. If this authorization is not granted, the Government of Iran would not be allowed to participate in the dispute settlement proceedings.

Furthermore, a problem would also arise in relation to implementing the rulings of panels and the Appellate Body.

In addition to this, for Iran's accession protocol to be adopted by Iran's relevant constitutional institutions, the protocol should be consistent with Iran's Constitution. Due to the inconsistency of the WTO DSS with Iran's Constitution, this causes a legal impediment to Iran's WTO accession. In this chapter, the mechanisms of the WTO DSS are studied to recognize whether the DSS has a judicial or arbitration nature. If the WTO DSS is merely judicial, then, due to an interpretation which has been issued on Principle 139 of Iran's Constitution, there would be no conflict between this Principle and the WTO DSU and, therefore, there would be no legal impediment to Iran's WTO accession.

Iran has a legal system which is, to some extent, different from legal systems in other countries. However, similar to other legal systems, the Iranian legal system includes rules on accession to multilateral organizations that its constitutional authorities have to abide by. Therefore, a solution to remove the mentioned legal impediment must be found that is compatible with Iran's laws, including Iran's Constitution. Any proposed solution that might be viable in other legal systems, but which would disregard the main elements of Iran's system, would not work in Iran or may result in other problems during or after accession process to the WTO. The legal impediment to Iran's accession to the WTO can only be identified and removed with a sound understanding of Iran's constitutional system. Therefore, the third chapter briefly introduces Iran's constitutional system. How Iran adopts international agreements is also addressed.

The fourth chapter focusses on Iran's adoption process for the adoption of the WTO accession protocol. There are several constitutional institutions that are involved in this adoption process. It bears mentioning that the legal impediment to Iran's WTO accession would result from the constitutionality check which is discussed in detail in this chapter. Therefore, the first research question is addressed earlier and continued in chapter four.

The fifth chapter analyzes whether it is possible to overcome the legal obstacles identified in chapters one to four by means of the available legal interpretations. The requirements for the referral of a dispute to international

dispute settlement systems contained in Iran's Constitution are analyzed. Thereafter, legal interpretations of Principle 139 are examined to discover how the legal impediment to Iran's WTO accession can be removed. These legal interpretations include literal, historical, authentic, systemic, doctrinal and teleological interpretations. The no conflict view is also introduced in chapter five.

The actual legal practice used in relation to Principle 139 of Iran's Constitution to remove the legal impediment is discussed in chapter six. How the Parliament and the Government enforce this constitutional rule, and how the international tribunals – such as Iran's United States Claims Tribunal – have dealt with Iran's domestic legal restrictions on dispute settlement are examined in this chapter.

Therefore, the second research question regarding whether it is possible to overcome the legal obstacle identified under research question one by means of the available legal interpretations and practices are examined in chapters five and six.

The seventh chapter analyzes the additional possible and practical solutions – other than those discussed in chapters five and six – to remove the legal impediment of Iran's accession. As will be discussed, under international law, WTO law and Iran's domestic legal system, there are several political and legal ways to remove the legal impediment to Iran's accession. Therefore, chapter seven addresses the third research question of this dissertation.

The legal impediment that is the focus of this thesis, 'the WTO Dispute Settlement System as a legal impediment to Iran's accession to the WTO', can be removed on the basis of the solutions which are suggested in chapter seven.

A conclusion highlights the main findings of this dissertation and concludes.

It bears mentioning that there are a number of Iran's laws, regulations and also views of Iranian experts (the original texts in Farsi) that are discussed in this dissertation. The English translation of some of Iran's laws and regulations, such as the Constitution and the Civil Code, is taken from the

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website of the World Intellectual Property Organization (WIPO).¹³ The English translation of other laws and regulations, such as the Parliament's Rules of Procedure is taken from official Iranian websites.¹⁴ The rest of relevant laws and regulations is translated by the author, which is indicated in the footnote as: (Translation S.A).

¹³ See the WIPO website for English translation of Iran's Laws and regulations at: <http://www.wipo.int/wipolex/en/profile.jsp?code=IR>

¹⁴ For instance for the Parliament's Rules of Procedure see: <http://en.parliran.ir/eng/en/The%20Rules%20of%20Procedure>

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Chapter 1: WTO Accession

1.1. Introduction

In the Introduction chapter it was described how Iran applied for accession to the World Trade Organization (WTO) in 1996. Even though Iran was granted observer status in 2005, it is not yet a member of the WTO. Iran's accession process is obstructed by several factors, including a conflict between Iran's laws, regulations and administrative procedures and WTO law. To facilitate Iran's accession to the WTO, these factors should be recognized and the obstacles should be removed.

The first research question of this dissertation addresses whether there is any legal conflict between the WTO DSU and Iran's constitutional system in Iran's accession to the WTO. Before examining this question, it is shortly introduced what the WTO accession process is and Iran's current position in this process.

The introduction commences by presenting the origin and evolution of the WTO (section 1.2) and subsequently reviews the WTO accession process (section 1.3). The treatment of the accession process includes both procedural and substantive elements, but it also describes the negotiation process. Section 1.4 presents the legal obligations and the benefits of accession for Iran. This section also presents how the idea of accession to the WTO emerged and has developed in Iran and what has been done by Iran in the course of this accession process.

Finally it is stressed in this chapter that this dissertation will focus on the WTO dispute settlement system (DSS), since this is a reoccurring problem in the various agreements. Therefore, why the focus will be on the DSS is shortly discussed here and also in detail in the subsequent chapters.

1.2. General Information on Accession to the WTO

Following the Second World War, the United States called upon its wartime allies to start negotiating the establishment of a multilateral agreement to reduce tariffs on trade in goods. Yet, in February 1946, the United Nations Economic and Social Council (ECOSOC) had already adopted ECOSOC

Resolution 13 (E/22),¹ which called for the drafting of a 'charter of an International Trade Organization (ITO)' through an international conference. Therefore, in 1946 a Preparatory Committee was formed to work on the drafting of this charter. The first meeting took place in London in October 1946 and a subsequent meeting was held between April and November 1947 in Geneva. The focus of the Geneva discussions was on three parts: the first part was on the continuation of drafting the ITO Charter; the second part was on the negotiations for tariff reductions in the form of a multilateral agreement; and the third part was on the drafting of the 'general clauses' of obligations concerning tariff obligations. The two latter parts together formed the General Agreement on Tariffs and Trade (GATT).² Although the negotiations on the ITO were challenging³ and could not be completed before 1948, the negotiations on the GATT (which was supposed to be attached to the ITO Charter) resulted in an agreement in October 1947. The desire arose to bring the GATT into force before the ITO Charter was finished. Jackson explained the two reasons behind these discussions:

First although the tariff concessions were still a secret, the negotiators knew that the content of the concessions would begin to be known. World trade patterns could thus be seriously disrupted if a prolonged delay occurred before the tariff concessions came into force. Second, the US negotiations were acting under the authority of the US trade legislation which had been renewed in 1945... but the 1945 Act expired in mid-1948. Thus, there was a strong motivation on the part of the United States to bring the GATT into force before this Act expired.⁴

Even though it was decided that the provisions of the GATT should be brought into force immediately, some other problems arose. Some obligations under the GATT required reforms in the legal systems of some countries and thus necessitated parliamentary consent. Because the ITO

¹ P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, Third ed. (Cambridge University Press, 2013), p. 76.

² J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, Reprint ed. (Royal Institute of International Affairs, 1998), p. 16.

³ The negotiations on the ITO were difficult and it was clear, towards the end of the 1947 Geneva meeting, that the ITO Charter would not be finished before 1948, see Van den Bossche and Zdouc (2013), p. 76.

⁴ Jackson (1998), pp. 17-18.

Charter would be submitted in 1948 or the following year to their parliaments, negotiators preferred to submit the GATT and ITO Charter as one package to ensure approval. On 30 October 1947, 8 of the 23 negotiating countries of the GATT signed the 'Protocol of Provisional Application of the General Agreement on Tariffs and Trade' (PPA) to address the aforementioned problem.

Under this Protocol, the Contracting Parties accepted to *apply provisionally as from 1 January 1948* Part I and III of the GATT 1947 in full and Part II 'to the fullest extent not inconsistent with existing legislation'.⁵ This was due to the fact that Part II included substantive provisions which required changes to national legislation. In subsequent years, the PPA was also accepted by other Contracting Parties of the GATT 1947. The PPA, which provided for 'grandfather or existing legislation rights',⁶ permitted the Contracting Parties to maintain national legislations that was inconsistent with the GATT Part II. The GATT 1947 was applied through the PPA until 1996.

Even though the negotiations on the ITO Charter were completed in March 1948 in Havana, the ITO Charter would not enter into force because the United States Congress did not give its approval. Such an important international organization for trade could not be instituted without the United States, as the world's leading economy and trading nation, being involved.⁷

From the 1950s onwards until the end of 1994, the GATT 1947, as a *de facto* organization, was successful in reducing tariffs on trade in goods. In its eight rounds of GATT negotiations (Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956, Dillon 1960-I, Kennedy 1964-7, Tokyo 1973-9, and Uruguay 1988-94), the average level of imposed tariffs by developed countries was reduced from 40 percent to less than 1 percent.⁸ In the 1980s, however, some

⁵ GATT BISD, Volume IV, 77. Part I of the GATT 1947 contained the MFN obligation and the obligation regarding tariff concessions, and Part III procedural provisions.

⁶ Van den Bossche and Zdouc (2013), p. 77.

⁷ Ibid, p. 78.

⁸ Recently international trade flows have been further reduced. As of 2012, the average tariff applied on imports is less than 1 per cent in developed countries and averages between 4 and 10 per cent in developing country regions. Lower import tariffs are mirrored by more liberal market access conditions, especially for developing countries.

countries, including the United States, were of the opinion that the GATT would not suffice to respond to the new needs of international trade. The decision to start the negotiations was taken at a ministerial meeting in April 1986 in Punta del Este⁹, which is in Uruguay. The subsequent negotiations were therefore referred to as the Uruguay Round. The new negotiations, which also included new subjects such as trade in services and the protection of intellectual property rights, resulted in forming a new multilateral organization which is called the World Trade Organization (1995).¹⁰

At the beginning of Uruguay Round the establishment of a new organization was not on the agenda. In February 1990 the Italian Trade Minister, Renato Ruggiero, raised this idea to set up an international organization for trade and later, in April 1990, Canada formally made this proposal. The European Community then followed the idea by submitting a proposal which called for forming a 'Multilateral Trade Organization' to ensure the effective implementation of the results of the negotiations.¹¹ Later in November 1991, the European Community, Canada and Mexico made a joint proposal supporting the idea of establishing an international trade organization.¹² This joint proposal resulted in negotiations and a draft agreement in December 1991 to establish a multilateral trade organization. This draft was referred to as the 'Dunkel Draft'.¹³ It was rejected by the United States until 1993.¹⁴ When all other participants to the negotiations agreed upon establishing a multilateral organization for international trade, the Clinton Administration of the United States finally gave up its opposition in December 1993 but demanded, and obtained, that the name of the new organization would be the

In 2012, the average tariff faced by exports ranged from 1 per cent for Latin America to about 3.5 for South Asia. UNCTAD, "Key Statistics and Trends in Trade Policy", (Division on International Trade in Goods and Services, and Commodities, 2013), p. 5.

⁹ D.L.M. Kennedy and JD Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), p. 409.

¹⁰ R.A. Reis, *The World Trade Organization* (Chelsea House Publishers, 2009), p. 41.

¹¹ Van den Bossche and Zdouc (2013), p. 80.

¹² D. Armstrong, T. Farrell, and H. Lambert, *International Law and International Relations*, Second ed. (Cambridge University Press, 2012), p. 241.

¹³ R. Wolfrum, P-T Stoll, and K. Kaiser, *WTO: Institutions and Dispute Settlement*, Max Planck Commentaries on World Trade Law (Martinus Nijhoff, 2006), p. 577.

¹⁴ H. Yamane, *Interpreting TRIPS: Globalisation of Intellectual Property Rights and Access to Medicines* (Bloomsbury Publishing, 2011), p. 143.

‘World Trade Organization’. The Agreement Establishing the World Trade Organization (referred to as the WTO Agreement) was signed in April 1994 in Marrakesh and entered into force on 1 January 1995.

At the time the World Trade Organization was established in 1995, Article XI:1 of the WTO Agreement allowed the Contracting Parties of the GATT 1947 and the European Communities (as the European Union was referred to before 2010) to join the WTO as the original members. Except for Yugoslavia,¹⁵ all the GATT 1947 Contracting Parties joined the WTO. Article XI:1 of the WTO Agreement states:

The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.¹⁶

As the WTO was not supposed to be a multilateral organization with membership restricted to the GATT Contracting Parties (and the European Communities),¹⁷ a provision was included to allow non-GATT Contracting Parties to join the WTO.¹⁸ Note that, in contrast to most multilateral organizations, under the WTO Agreement accession is not limited to states. Under Article XII:1 of the WTO Agreement, in addition to states, the ‘*separate customs territory possessing full autonomy in the conduct of its external commercial relations*’ can also accede to the WTO.

To join the WTO, as it is stated in Article XII:1 of the WTO Agreement, the applicant should negotiate the terms of accession with the current Members and accept the terms of the WTO Agreement and all multilateral trade

¹⁵ U. Dadush and C. Osakwe, *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, 2015), p. 515.

¹⁶ Marrakesh Agreement Establishing the World Trade Organization Article XI:1.

¹⁷ M.E. Footer, *An Institutional And Normative Analysis of the World Trade Organization*, vol. Volume 46 of Legal Aspects of International Organizations (Martinus Nijhoff Publishers, 2006), pp. 71-72.

¹⁸ The relevant provision, which sets out an accession procedure, is contained in Article XII of the WTO Agreement.

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agreements.¹⁹ In addition, the negotiations include a review of whether the applicant's legislation and practices²⁰ are consistent with WTO law and what is required to make them fully consistent. The applicant should also negotiate on market access concessions and commitments concerning trade in goods and services.

The accession process, according to the website of the WTO, is subdivided into four phases, the names of which are as follows:²¹

- First, 'tell us about yourself' phase;
- Second, 'work out with us individually what you have to offer' phase;
- Third, 'let's draft membership terms' phase; and
- Fourth, 'the decision' phase.

Each phase is described in turn. First, the 'tell us about yourself' phase: The applicant makes a report on its trade and economic policies. The report, called a 'Memorandum on the Foreign Trade Regime', should be submitted based on a format attached to the WTO document 'WT/ACC/1'. This format is drafted based on the experience of the GATT Accession Working Parties.²² This Memorandum, as well as the applicant's legislation and practices on WTO rules, will be circulated to all WTO Members. The information received from the applicant should be examined (for full consistency with the WTO rules) by a working party which will be established for the accession of the applicant.

Second, the 'work out with us individually what you have to offer' phase: When enough progress has been reached in the working party that checks the consistency between the applicant's legislation and practices with the relevant WTO agreements, bilateral talks on market access concessions and

¹⁹ Van den Bossche and Zdouc (2013), p. 109.

²⁰ WTO Agreement Article XVI:4 states: 'Laws, legislation and administrative procedures'.

²¹ See WTO website at: www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm#join, last visited on 1-10-2016.

²² WTO Technical Note on the Accession Process, Note by the Secretariat, WT/ACC/10/Rev.4, 11 January 2010.

commitments can be initiated. The result of these bilateral talks between the accession applicant and the individual Members will be disclosed to other WTO Members based on the non-discrimination principle (MFN).²³ It bears considering that, as a result of the MFN treatment obligation under the GATT and GATS, the market access concessions and commitments negotiated with one WTO Member will benefit all WTO Members.

Third, the 'let's draft membership terms' phase: Once the previous phases are concluded, the working party will send the results to the General Council or the Ministerial Conference.²⁴ The results will be submitted in the form of three documents:²⁵

- 1) A working party report;
- 2) A draft 'protocol of accession'; and
- 3) The draft 'goods schedule' and 'services schedule' (including the applicant's concessions and commitments on market access).

Fourth, 'the decision' phase: In this phase the accession of the applicant will be adopted by a two-thirds majority²⁶ (in practice through consensus)²⁷ of the

²³ There are two rules originating from the non-discrimination principle which are the Most-Favoured-Nation (MFN) principle: treating other people equally; and the National Treatment principle: Treating foreigners and locals equally. For further information, see:

http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#mfu, last visited on 1-10-2016.

²⁴ The Ministerial Conference is the 'supreme' body of the WTO. It is composed of minister-level representatives from *all* Members and has decision-making powers on *all* matters under *any* of the multilateral WTO agreements. Decisions by the Ministerial Conference are binding on Members. The General Council is responsible for the continuing, 'day-to-day' management of the WTO and its many activities. In between sessions of the Ministerial Conference, the General Council exercises the full powers of the Ministerial Conference. In addition, the General Council also carries out some functions assigned to it. These definitions are quoted from: Van den Bossche and Zdouc (2013), pp. 121-122.

²⁵ P.J. Williams, *A Handbook on Accession to the WTO* (Cambridge University Press, 2008), p. 44.

²⁶ The WTO Agreement Article XII:2 states: 'Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on

WTO Members in the Ministerial Conference or the General Council. Then, 30 days after the applicant submits the ratification documents of its accession protocol to the WTO, the applicant will become a WTO Member. The final ratification will be done based on the domestic rules of the applicant related to the adoption process of multilateral agreements.²⁸ The decision on accession is usually taken by the national parliament. It bears mentioning that when the protocol of accession is finalized in the WTO and ratified in accordance with the applicant's domestic rules it will become an integral part of the WTO Agreement and therefore can be enforced through the WTO dispute settlement system.²⁹

So far, 36 accessions have been completed. The following countries have acceded to the WTO: Afghanistan, Albania, Republic of Armenia, Bulgaria, Cambodia, Cabo Verde, China, Croatia, Ecuador, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Jordan, Kazakhstan, Kyrgyz Republic, Lao People's Democratic Republic, Latvia, Republic of Liberia, Lithuania, Moldova, Mongolia, Montenegro, Nepal, Oman, Panama, Russian Federation, Samoa, Saudi Arabia, Seychelles, Chinese Taipei, Tajikistan, Tonga, Ukraine, Vanuatu, Viet Nam, and Yemen.³⁰

Presently there are 19 applicants in the accession process. These are: Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Equatorial Guinea, Ethiopia, Iran, Iraq, Lebanese Republic, Libya, Sao Tomé and Príncipe, Serbia, Sudan, Syrian Arab Republic, and Uzbekistan.³¹

the terms of accession by a two-thirds majority of the Members of the WTO', <http://www.wto.org>.

²⁷ While Article XII of the WTO Agreement provides that decisions on accession are taken by a two-thirds majority of the Members, in practice these decisions (with the exception of the decision on the accession of Ecuador (1996)) have been taken by consensus. Therefore, the accession of Iran to the WTO will be adopted by consensus. This is explained in detail later in this chapter.

²⁸ For a detailed discussion on Iran's adoption process for multilateral agreements, see chapters three and four.

²⁹ See WTO Panel Reports on China-Raw Materials (2012), paras. 7.112 and 7.114.

³⁰ The information on acceded countries is taken from the WTO website on 01-08-2016.

³¹ Ibid, 01-08-2016.

After briefly introducing the basic requirements for acceding to the WTO and before discussing the substance of the accession process and the required obligations, each phase of the accession process is presented below in more detail.

As mentioned earlier in this chapter, the Procedures for Negotiations under Article XII have been modeled on the basis of the procedures followed by the Contracting Parties to the GATT 1947, including the Complementary Procedures on Accession Negotiations agreed to by the Council of the GATT 1947 in 1993 and the statement by the Chairman of the Council of the GATT 1947 on the Management of Accession Negotiations in 1994.³² The draft suggested by the Secretariat – which emerged from a consultation process with some interested WTO Members – was proposed as a ‘practical guide’ for the acceding governments to the WTO and was not submitted to the Ministerial Conference or General Council to be adopted as a general policy statement.³³ The *Technical Note on Accessions* is therefore a guide for WTO practice on accession and is not binding.³⁴ The accession procedures include the application, the establishment of the working party, negotiations, the adoption of the report by Ministerial Conference/General Council and, finally, the accession (the WTO membership). These procedures are described below in so far as they are relevant for the dissertation:

- Application

The application for accession to the WTO starts with a formal letter of the applicant to the Director General of the WTO. Although there is not any prescribed form, the applicant should indicate its wish to accede to the WTO under Article XII of the WTO Agreement.³⁵ The text that is usually communicated in the letter is as follows:

³² See WTO document L/7317 (27 October 1993) and C/Com/4 (10 November 1994).

³³ Williams (2008), p. 24.

³⁴ Footer (2006), p. 245.

³⁵ B. Yusuf, *How to Optimize Advantages of Accession to the World Trade Organization: and Measures to be Taken to Meet Possible Challenges*, PSD-Hub publication (Private Sector Development Hub-Addis Ababa Chamber of Commerce and Sectoral Associations, 2008), p. 54.

I have the honor to inform you of the wish of [applicant A] to accede to the Agreement Establishing the World Trade Organization and to the Multilateral Trade Agreements annexed thereto, in accordance with Article XII of the said Agreement.³⁶

According to the standard procedure, the application, once received, should be circulated by the Director General to all WTO Members as the first document formally published in the series of documents regarding each accession.

Then, the application will be placed on the agenda of the meeting of the General Council. The Chairman of General Council usually asks the applicant to introduce the main features of its current trade and economic regime. The applicant will also be asked to describe the reasons for its application for accession to the WTO.

The General Council establishes a working party to examine the application if it finds the application acceptable. The terms of reference of the working party³⁷ are also proposed by the Chairman of the General Council. An accession applicant can apply for the 'observer status' of the WTO before its formal application for accession. The observer status of the applicant is decided upon by the General Council.³⁸

- The Working Party

The non-binding 'Procedures for Negotiations under Article XII', which were suggested on 24 March 1995 by the WTO Secretariat, is at the basis of the

³⁶ Williams (2008), p. 28.

³⁷ The terms of reference for accession working parties are to examine the application of the applicant to accede to the WTO under Article XII of the WTO Agreement and to submit to the General Council/Ministerial Conference recommendations which may include a draft protocol of accession, as suggested in para. 5 of the Note by the Secretariat on the Procedures for Negotiations under Article XII, WTO document WT/ACC/1.

³⁸ Guidelines for Observer Status for Governments in the WTO, Annex two to Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WTO Document WT/L/161, 25 July 1996.

procedures that are followed by the accession working parties.³⁹ The working party process includes three parts which are as follows:

Part one includes a fact-finding exercise to collect the factual information about the applicant's trade regime. This fact finding serves the purpose of clarifying the necessary changes required in the applicant's domestic legal system to bring it into compliance with the WTO rules and provides the basis for the market access negotiations.⁴⁰ In this stage, as already mentioned above, the applicant submits a detailed Memorandum on its trade regime which is circulated among the WTO Members.

The Memorandum on the applicant's trade regime should be prepared based on a format which is attached to the WTO document WT/ACC/1. This format includes seven headings:

- Introduction
- Economy, Economic Policies and Foreign Trade
- Framework for Making and Enforcing Policies Affecting Foreign Trade in Goods and Services
- Policies Affecting Trade in Goods
- TRIPS Regime
- Trade-Related Services Regime
- Institutional Base for Trade and Economic Relations with Third Countries

When the Memorandum is circulated among the WTO Members, the working party members can ask questions for clarification and answers are submitted in writing by the applicant. The composition of the working party can be different from one applicant to another applicant. The membership is open for all WTO Members and it depends on their particular trade interests. It bears mentioning that all WTO Members are *de jure* member of all accession working parties. However, *de facto*, Members with no or very limited trade or interest in trading with an applicant will never or seldom participate in the work of the relevant working party. The working party holds its first meeting to examine the consistency of the applicant's domestic

³⁹ Williams (2008), p. 32.

⁴⁰ Ibid, p. 33.

legal system with the WTO agreements. Then, the Secretariat circulates a Factual Summary of Points Raised in the discussion held at the meetings of the working party to all WTO Members. This factual summary will eventually be a part of the Working Party Report.⁴¹

Part Two: Negotiation on terms of accession. This part includes three kinds of multilateral, plurilateral and bilateral negotiations.

In the multilateral negotiations, it is discussed whether the applicant's law and legislation are consistent with WTO multilateral agreements. There can also be negotiations on WTO-plus obligations, WTO-minus rights between the acceding country and the working party members. During these discussions/negotiations, the applicant submits legislative action plans to the working party members. The legislative action plans usually outline the work program underway to amend the applicant's legislation and also specify target dates for the implementation of the legal changes.⁴² The applicant is usually expected to present the draft of its legislation to the interested working party members before they are enacted by its parliament. Even though this presentation is not mandatory, it can avoid the potential resulting dissatisfaction of the working party members after they are enacted.⁴³

The plurilateral negotiations are on the level of agricultural support and export subsidies (for instance for cotton)⁴⁴ and sometimes can include other issues such as SPS,⁴⁵ TBT,⁴⁶ and TRIPS.⁴⁷ The plurilateral negotiations are usually between the applicant and a group of working party members.

⁴¹ Williams (2008), p. 33.

⁴² Ibid, p. 39.

⁴³ Ibid, p. 40.

⁴⁴ The Nairobi Ministerial Conference adopted a decision on cotton (WT/MIN(15)/46) prohibiting export subsidies and calling for a further reduction in domestic support. It also calls for improvements to market access for least-developed countries (LDCs). The decision aims to level the playing field for cotton exporters in the poorest countries, where the cotton sector is of vital importance.

⁴⁵ The WTO Agreement on Sanitary and Phytosanitary Measures. This Agreement is about the application of food safety and animal and plant health regulations.

⁴⁶ The WTO Agreement on Technical Barriers to Trade. This Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade.

In the bilateral negotiations, the applicant negotiates with individual working party members on access conditions to its goods and services markets. The bilateral negotiations are conducted confidentially until the results are shared with other WTO Members based on the non-discrimination rules.

The bilateral negotiations on tariff concessions and services commitments can be started by either the applicant or the working party members. But, in practice, WTO Members prefer to wait for the initial offer of proposed bound tariff rates or services commitments by the applicant. The applicant's offers will be submitted to the Secretariat in a standard format and will then be circulated among the working party members.⁴⁸ The offers on goods and services should be tabled at the same time so that the negotiations can proceed jointly.⁴⁹ The bilateral negotiations are usually arranged around the working party meetings. Some Members may negotiate on goods or services and others on both. Those who start simultaneous negotiations usually finish both at the same time by signing and submitting them to the Secretariat. When the bilateral and plurilateral negotiations with the interested Members are concluded, the Secretariat drafts and circulates the results (commitments) as Goods and Services Schedules in one of the three official languages (English, French or Spanish) at the choice of the applicant.⁵⁰ It bears mentioning that, under the most-favored nation clause (MFN), the least restrictive commitment by the applicant will be taken up in the draft Schedule and will be applicable to all WTO Members. In fact, any commitment to one Member will be considered a commitment to all WTO Members.⁵¹

Part three: Finalizing the draft Report, which includes the draft protocol of accession composed of the general rules of accession and the results of multilateral, plurilateral and bilateral negotiations. The results of the negotiations in the form of the Goods and Services Schedules are annexed to

⁴⁷ The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. This Agreement is on the minimum standards for the protection of industrial property rights and copyright and the related works.

⁴⁸ The offers are circulated to the working party members in this format: WT/ACC/SPEC.

⁴⁹ Williams (2008), p. 40.

⁵⁰ Ibid, p. 41.

⁵¹ Ibid, p. 44.

the draft Report. Once the package is approved by the working party members, the whole package of the Report and Schedules should be submitted to the General Council or Ministerial Conference for the final adoption of the accession decision.

The Working Party Report can be put on the agenda of the General Council and the Ministerial Conference if all financial obligations of the applicant including the contribution to the budget as an observer have been paid. All accessions (except for Ecuador)⁵² have been adopted by consensus in the General Council. Thereafter the applicant is asked to accept the terms of the accession by accepting the protocol of accession. The protocol specifies a date until which the applicant has to accept. When the applicant's representative signs the protocol of accession, that person also proposes the period of time (usually three to six months) needed for the completion of the national procedures for accepting the terms of the agreement.⁵³ This time can also be extended by the General Council, as has for instance been the case in the accession processes of Cambodia⁵⁴ and Tonga.⁵⁵ 30 days after the required ratification is obtained and the instrument of ratification is submitted to the WTO Secretariat, the applicant becomes a Member of the WTO. This time enables WTO Members 'to take any action necessary to apply the WTO Agreement to the new Member'.⁵⁶

An important element in relation to the decision-making criteria in the accession process should be underlined. Under Article XII:2 of the WTO Agreement, the decisions on accession shall be taken by the Ministerial Conference by a two-thirds majority of the Members of the WTO. Yet, on 15 November 1995 the General Council adopted a decision on 'Decision-Making Procedures under Articles IX and XII of the WTO Agreement' which states:

On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII

⁵² Ecuador's accession was adopted by the General Council through a two-thirds majority, WTO document: WT/ACC/ECU/5, 22 August 1995.

⁵³ Williams (2008), p. 44.

⁵⁴ See the WTO document WT/L/561.

⁵⁵ See the WTO document WT/L/651.

⁵⁶ Williams (2008), p. 47.

of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII. The above procedure does not preclude a Member from requesting a vote at the time the decision is taken.⁵⁷

According to this decision, the criterion of consensus was added. Therefore, before taking a decision on the basis of the general two-thirds majority rule, the General Council tries to take the decision on the basis of consensus. If consensus cannot be achieved, the default two-thirds majority procedure can be invoked. Therefore, the decisions relating to every step of the accession process, such as the application, the granting of observer status, the establishment of working party, or the adoption of the Report and protocol of accession, should be adopted by consensus.

Even though the decision by General Council of 15 November 1995 has not amended Article XII:2, it has *de facto* added an extra requirement to the decision-making method of waivers or accessions in the WTO. It bears mentioning that this requirement of consensus for decisions on waivers or accessions had not been mentioned in the WTO Agreement. Therefore, the question is whether under the WTO rules, the General Council possesses the legal position to add such an important requirement to the WTO Agreement. In practice, all decisions on accessions – except for Ecuador (1995)⁵⁸ – were

⁵⁷ Decision-Making Procedures Under Articles IX and XII of the WTO Agreement, Statement by the Chairman, 24 November 1995, WTO document WT/L/93, www.wto.org.

⁵⁸ Frank Hoffmeister, in the last chapter of the book on 'The EU's Role in Global Governance' says: 'When the accession of Ecuador was on the agenda in July 1995, the Chairman of the General Council received consensus in the room to proceed to a vote. He submitted the decision to a vote by postal ballot in line with the Rules of Procedure of the General Council. However, it turned out that a not insignificant number of states took their time to cast the vote. Any 'missing' vote, however, would *de facto* be counted as a negative vote, since such votes did not count to passing the required two-thirds threshold from the entire membership. Inter alia, to prevent such occurrences in the future, the membership agreed to equally apply consensus for accession decisions.' , available at <https://books.google.nl/books?id=NxWeAwAAQBAJ>, last visited 1-10-2016. Chapter 9 on the Institutional Aspects of Global Trade Governance from an EU Perspective.

taken under this extra requirement which was not adopted by the contracting parties of the WTO Agreement in the Uruguay Round.⁵⁹ It bears mentioning that, according to the current practice of the General Council on accession, Iran's WTO accession would be adopted on the basis of consensus.

After introducing the procedural rules of accession to the WTO, the substantive rules are also briefly discussed here.

1.2.1. Substance of the Accession Process

As presented before, the WTO accession process is composed of two aspects: the accession procedures and the substantive rules of accession. When introducing the accession procedures, it was described how the accession process can be initiated and continued until the acceding country joins the WTO. It was also mentioned that there are some rules which should be checked and discussed multilaterally, plurilaterally and bilaterally in the accession process. The final accession protocol, Working Party Report and the Goods and Services Schedules are drafted based on negotiations on the substantive rules that are stated in the WTO agreements. These substantive rules are introduced in this section.

One of the most important substantive rules governing the accession process is contained in Article XII:1 of the WTO Agreement, stating that a Member accedes to the WTO '*on terms to be agreed between it and the WTO*'. That is why WTO accession is different for each acceding Member and the obligations which result from the negotiations differ. During the WTO accession process, each acceding government negotiates its own unique concessions on customs duties, commitments on agricultural support and export subsidies and specific commitments on its services regime on the basis of its national

⁵⁹ On the consensus criteria, for instance the Working Party Chair on Russia's accession, Ambassador Stefán Jóhannesson (Iceland), said that: 'All Members contributed to Russia's accession, by constructing the consensus necessary to conclude the accession. The documents before the Ministerial Conference, constituting Russia's terms of entry into the WTO, resulted from a tough and successful engagement between Russia and WTO Members.', https://www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm, last visited on 1-10-2016.

measures.⁶⁰ This unique process provides flexibility, which is helpful for both parties to find a balance between the commitments and concessions that are made (based on the special circumstances and the level of economic development of the applicant) and thereby potentially extends the advantages that an acceding country can achieve through its accession to the WTO.

Commitments stated in the accession protocol and Working Party Report and Schedules become an integral part of the WTO agreements and can be enforced through the dispute settlement system of the WTO. The acceding country's commitments and concessions resulting from the negotiations are set out in the Report. The Working Party's Report on these commitments usually includes the following main headings:⁶¹

1. Introduction;
2. Economic policies;
3. Framework for making and enforcing policies;
4. Policies affecting trade in goods;
5. Trade-related intellectual property regime;
6. Policies affecting trade in services;
7. Transparency;
8. Trade agreement; and
9. Conclusions.

Although there are no specific substantive rules on the accession process, there are some general rules and guidelines which are commonly used in the WTO accession process by both parties. For instance, as a general rule, the applicant should not introduce new restrictive measures while the accession negotiations are ongoing.⁶² Also, it is a common practice that the acceding country should submit its comprehensive legislative and administrative action plans to the working party members. These action plans outline the work programs undertaken in the applicant country to achieve full conformity with all WTO rules by the date of its accession.⁶³ Additional action plans can also

⁶⁰ Williams (2008), p. 48.

⁶¹ Ibid, p. 49.

⁶² Ibid, p. 50.

⁶³ Williams (2008), p. 50.

be requested by the working party members on issues dealing with specific subjects of the WTO agreements.⁶⁴

Another general rule which is important in the context of the accession process is the 'transitional period'. By transitional period, I want to discuss that developing country applicants may negotiate transition periods for some of the WTO obligations similar to the transitional periods that were provided for in the first years of the WTO for developing country Members and LDC Members.

After the establishment of the WTO, different transitional periods were recognized depending on whether the applicant would qualify itself as a developed, a developing or a least-developed country. Most of these transitional periods have either expired or were refused by the WTO Members for the acceding countries. When an acceding country has difficulties to bring its legal system into conformity with the WTO rules, it may request a transitional period. If granted, the applicant should bring its domestic legal system into consistency with the WTO rules after it accedes to the WTO. Among the developing acceding countries, China is one of the countries that has been granted such a transitional period.⁶⁵ The least-developed countries can request a transitional period under some conditions that are stated in the General Council Guidelines and some provisions of the WTO agreements, such as Article 61:1 of TRIPS Agreement.⁶⁶

Last but by no means least, the substantive rules that are discussed between the acceding country and the working party members also include the rules which are contained in the WTO agreements. In 1994, the results of the

⁶⁴ Ibid, p. 51.

⁶⁵ For further information see Williams (2008), p. 54.

⁶⁶ Article 66:1 of the TRIPS Agreement states: 'In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.', http://www.wto.org/english/docs_e/legal_e/27-trips.pdf, last visited on 1-10-2016.

Uruguay Round⁶⁷ were annexed to the WTO Agreement (Agreement Establishing the World Trade Organization). The WTO Agreement includes rules on the functions and structure of the WTO, rules on the budget, decision making, amendments and accession, etc. One of the most important rules in this Agreement, which is a marked difference to other multilateral organizations, is the ‘single undertaking approach’ contained in Article II:2 of the WTO Agreement. The ‘single undertaking’ will be discussed in detail in this chapter.⁶⁸ The single undertaking rule means accept all multilateral agreements.

The agreements which are annexed to the WTO Agreement and are an integral part of that Agreement are as follows:

1. Annex 1A Multilateral Agreements on Trade in Goods

The General Agreement on Tariffs and Trade (GATT) 1994 is the main WTO agreement on trade in goods. WTO law describes the GATT as: ‘entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.’⁶⁹ The most important rules of the GATT are the ‘Most Favored Nation Clause’ (MFN), ‘National Treatment’,⁷⁰ and the rule of prohibition on quantitative restrictions.^{71,72} It bears mentioning that WTO Members can adopt measures

⁶⁷ The Uruguay Round (1986-94) was the eighth trade negotiations round of the GATT which resulted in the establishment of the WTO. For further information see section 1.2. General Information on Accession to the WTO.

⁶⁸ See section 1.4.2.

⁶⁹ GATT 1947. See the GATT full text at: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf, last visited on 1-10-2016.

⁷⁰ These two rules were defined earlier in this chapter.

⁷¹ Article XI:1 of the GATT 1994 generally prohibits quantitative restrictions on the importation or the exportation of any product, by stating ‘*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.*’

⁷² In general, WTO law includes five groups of basic rules dealing with trade in goods and services and the protection of intellectual property rights: (1) rules on non-discrimination; (2) rules on market access; (3) rules on unfair trade; (4) rules on the

restricting trade to protect, for instance, their national security, public health, public morals, etc. Some of the exceptions which are accepted under WTO law are: the general exceptions (Article XX of the GATT 1994 and Article XIV of the GATS), the national and international security exceptions (Article XXI of the GATT 1994 and Article XIV bis of the GATS), the safeguard measures exceptions (Article XIX of the GATT 1994 and the Agreement on Safeguards), the balance of payments measures exceptions (Articles XII and XVIII:B of the GATT 1994 and Article XII of the GATS), the regional trade agreements exceptions (Article XXIV of the GATT 1994 and Article V of the GATS), and the economic development exceptions (which are set out in 'special and differential treatment' provisions and the 'Enabling Clause').⁷³

Other WTO multilateral agreements on tariffs and trade in goods are:

- Agriculture Agreement: This Agreement includes special rules on agricultural export subsidies and domestic agricultural support measures.⁷⁴
- Sanitary and Phytosanitary Measures Agreement (SPS): This Agreement concerns the application of food safety and animal and plant health regulations.⁷⁵
- Technical Barriers to Trade Agreement (TBT): This Agreement relates to product regulations and standards of all kinds other than those covered by the SPS Agreement.⁷⁶
- Trade-Related Investment Measures Agreement (TRIMs): This Agreement, by recognizing that certain investment measures restrict and

conflict between trade liberalization and other societal values and interests; and (5) institutional and procedural rules, including those relating to WTO decision making, trade policy review and dispute settlement. For further information see: Van den Bossche and Zdouc (2013), p. 35.

⁷³ P. Van den Bossche and D. Prévost, *Essentials of WTO Law* (Cambridge University Press, 2016), p. 84.

⁷⁴ Van den Bossche and Prevost (2016), p. 174.

⁷⁵ For further information see

https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm, last visited on 1-10-2016.

⁷⁶ T. Epps and M.J. Trebilcock, *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing, 2013), p. x.

distort trade, provides that no WTO Member shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT.⁷⁷

- Anti-Dumping Agreement (Article VI of GATT 1994): This Agreement does not prohibit dumping, however, it governs the actions of Members in response to dumping.⁷⁸
- Customs Valuation Agreement (Article VII of GATT 1994): This Agreement has designed a system to promote fairness, neutrality and uniformity in the customs duty assessment which is used by the WTO Members.⁷⁹
- Pre-shipment Inspection Agreement: This Agreement recognizes that principles of the GATT Agreement apply to pre-shipment inspection agencies mandated by governments.⁸⁰
- Rules of Origin Agreement: This Agreement requires Members to ensure the transparency of their rules of origin. It also requires that WTO Members do not have restricting, distorting or disruptive effects on international trade. They should be administered in a consistent, uniform, impartial and reasonable manner. It also requires that they are based on a positive standard (they should state what does confer origin rather than what does not).⁸¹

⁷⁷ For further information see https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement, last visited on 1-10-2016.

⁷⁸ Van den Bossche and Prévost (2016), p. 141.

⁷⁹ S. Rosenow and B.J. O'Shea, *A Handbook on the WTO Customs Valuation Agreement* (Cambridge University Press, 2010), p. 2.

⁸⁰ For further information see https://www.wto.org/english/tratop_e/preship_e/preship_e.htm, last visited on 1-10-2016.

⁸¹ For further information see https://www.wto.org/english/tratop_e/roi_e/roi_e.htm, last visited on 1-10-2016.

- Import Licensing Agreement: This Agreement requires that import licensing be simple, transparent and predictable so as not to become an obstacle to trade.⁸²
- Subsidies and Countervailing Measures Agreement: This Agreement disciplines the use of subsidies and regulates the actions that countries can take to counter the effects of subsidies.⁸³
- Safeguards Agreement: This Agreement sets time limits on all safeguard actions and prohibits some safeguard measures. WTO Members can take a safeguard action to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.⁸⁴
- (Trade Facilitation Agreement (TFA): This Agreement aims to expedite the movement, release and clearance of goods, including goods in transit. It also contains measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. This Agreement, which was adopted in December 2013 during the Bali Ministerial Conference, has not yet entered into force.⁸⁵)

2. Annex 1B General Agreement on Trade in Services (GATS)

The GATS is a multilateral agreement which sets out rules on services. This Agreement includes three elements which are: 1) the general obligations and disciplines; 2) rules for specific sectors; and 3) specific commitments of individual countries to provide access to their markets including indications

⁸² For further information see https://www.wto.org/english/tratop_e/implic_e/implic_e.htm, last visited on 1-10-2016.

⁸³ For further information see https://www.wto.org/english/tratop_e/scm_e/scm_e.htm, last visited on 1-10-2016.

⁸⁴ For further information see https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm, last visited on 1-10-2016.

⁸⁵ For further information see https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm, last viewed on 1-10-2016.

of where countries are temporarily not applying the most-favored nation rule of non-discrimination in services.⁸⁶

3. Annex 1C Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement Includes two kinds of intellectual property rights which are: copyrights and related rights; and industrial property rights (such as trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information). Similar to the GATT and the GATS, the TRIPS also applies the basic MFN and National Treatment rules. The TRIPS states the minimum standards that the WTO Members should adopt in their domestic legal systems for the protection of intellectual property rights. The TRIPS advantage to other intellectual property conventions is its access to the effective enforcement mechanisms of the WTO dispute settlement system (DSS).

4. Annex 2 Dispute Settlement Understanding (DSU)

The WTO dispute settlement system (DSS), which includes several dispute settlement mechanisms (consultations, arbitration, good offices, mediation and conciliation) and adjudications (panel process, Appellate Body review), to settle disputes between the WTO Members based on the covered WTO agreements. It is discussed in the next chapter of this dissertation.

5. Annex 3 Trade Policy Review Mechanism (TPRM)

According to Part A:1 of the TPRM, this Agreement has the objective 'to contribute to improved adherence by all Members to rules, disciplines and commitments made under the multilateral trade agreements and, where applicable, the plurilateral trade agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade

⁸⁶ For further information see the WTO website on Understanding the WTO: The Agreements- Services: rules for growth and investment, at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm, last visited on 1-10-2016.

policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the agreements or for dispute settlement procedures, or to impose new policy commitments on Members.⁸⁷

6. Annex 4 Plurilateral trade agreements include the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (GPA) 1994.

The main difference between plurilateral and multilateral agreements is that all WTO Members shall be members of WTO multilateral agreements. However, only a group of WTO members have joined the plurilateral agreements. In other words, the single undertaking principle – which is defined later in this chapter⁸⁸ – does not include plurilateral agreements and, therefore, to accede the WTO, it is not required to join the plurilateral agreement. However, this can be agreed upon between working party members and the accession applicant (WTO-Plus).

The purpose of the Trade in Civil Aircraft Agreement is to eliminate import duties of all aircrafts and their related products (which are covered by this agreement), except for military aircrafts.

Regarding the second plurilateral agreement, it bears mentioning that government and public agencies usually purchase goods and services with public resources and for public purposes to fulfill their functions. Such purchases are generally referred to as government procurement.⁸⁹ The purpose of the Government Procurement Agreement is to promote transparency, integrity and competition in this field. It bears considering that the national treatment obligation of the GATT 1994 does not apply to government procurement and the GPA provides for such an obligation.

⁸⁷ See the full text of the TPRM at: http://www.wto.org/english/docs_e/legal_e/29-tprm.pdf, last visited on 1-10-2016.

⁸⁸ Under Article II:2 of the WTO Agreement, the single undertaking principle means that, in joining the WTO, the applicant should 'take it all (multilateral agreements), or leave it all'. See section 1.4.2. Single Undertaking Principle in this chapter.

⁸⁹ For further information, see the WTO website at: https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm, last visited on 1-10-2016.

This section reviewed how the WTO was established and the procedural and substantive rules of the accession process which should be followed by an applicant country wishing join the WTO. It was also pointed out that the accession process and the protocol of accession are unique for each applicant country because of the idiosyncrasies of an applicant's characteristics and domestic trade policies.

In the following section, it will be examined which benefits WTO membership can bring for Iran and how close Iran is to achieving WTO accession.

1.3. Iran and Accession to the WTO

Since 1996, Iran has been in the accession process to the World Trade Organization. Even though WTO membership has not been achieved yet and a number of obstacles have almost blocked the accession, Iran is still willing to remove these obstacles to assume its place within the WTO. This section describes why WTO membership is so important to Iran and its associated benefits.

1.3.1. Benefits of Accession for Iran

The Preamble of the WTO Agreement presents the main objectives for which the World Trade Organization has been established. These objectives are:

1. The increase of standards of living;
2. The attainment of full employment;
3. The growth of real income and effective demand; and
4. The expansion of production of, and trade in, goods and services.

These objectives should be promoted along with two other important goals. These goals, which were mentioned by the WTO Appellate Body in the US-Shrimp dispute (1998)⁹⁰ are: protection of the environment and promotion of sustainable development especially for the developing and the least-developed countries. These are the ultimate objectives which the WTO Members should take into consideration in implementing the WTO agreements. However, in the framework of these objectives, each individual

⁹⁰ Appellate Body Report, US-Shrimp (1998), para. 153.

country can have its own objectives and benefits. There are a number of benefits which have been recognized by the WTO bodies⁹¹ and accession countries. These benefits are also relevant in Iran's accession to the WTO, some of which are as follows:

- The system helps to promote peace;
- Disputes are handled constructively;
- Rules make life easier for all;
- Freer trade cuts the costs of living;
- Freer trade provides more choice of products and qualities;
- Trade raises income;
- Trade stimulates economic growth;
- The basic principles make life more efficient;
- Governments are shielded from lobbying; and
- The system encourages good government.

There are also other goals and benefits which are not discussed here due to the limited scope of this section on Iran's accession process to the WTO.

In addition to the above-mentioned benefits, Iran has its own motivation for WTO accession. These expectations were collected from a number of interviews with relevant official authorities, academic essays of interested experts, and statements from the private sector. Perhaps the most comprehensive survey about Iran's WTO accession was undertaken by Iran's Chamber of Commerce in January 2010 and encompassed questions to all its members. The Chamber of Commerce, Industries and Mines is the key representative of the private sector in Iran. One of its tasks is to give the government advice on trade and commerce issues, including the WTO. 95 percent of the private sector that participated in the survey supported the accession of Iran to the WTO and recognized its importance for the economic development of Iran. 80 percent of the respondents held the view that the accession was in line with the (implementation of the) General Policies

⁹¹ See the full report: WTO, "About the WTO: 10 Benefits of the WTO Trading System", (WTO Publications, 2009), available at: https://books.google.nl/books?id=YOIRSQAACAAJ&dq=About+the+WTO:+10+Benefits+of+the+WTO+Trading+System&hl=en&sa=X&redir_esc=y, last visited on 1-10-2016.

Pertaining to Principle 44 of the Constitution.⁹² The General Policies Pertaining to Principle 44 were drafted and adopted by Iran's National Expediency Council. These Policies, which are the most important policies of Iran on privatization, were decreed by Iran's Leader in June 2005.⁹³ As reported in the Chamber's survey, the benefits that the accession to the WTO can bring for Iran are as follows:⁹⁴

- Market Access

According to the survey, the first benefit that the WTO accession can bring for Iran is market access. This can be introduced as follows.

The accession of Iran to the WTO means a reduction or annulment of tariffs and non-tariff barriers. Iran's domestic market and consumers will benefit from a wider and more diverse choice of foreign goods. This means that competition on the domestic market will increase and Iranian producers are incentivized to improve their efficiency and product quality and output.⁹⁵

- Iranian producers will enjoy market access in other countries

The accession to the WTO and implementing its rules will allow Iranian producers and exporters to potentially have better opportunities to export. Iranian firms are incentivized to improve efficiency and product quality and output.⁹⁶

⁹² The adoption process of Iran's national general policies is discussed in chapter three, section 3.5.5. National Expediency Council.

⁹³ For further information, see the policies at: <http://irandataportal.syr.edu>, last visited on 1-10-2016.

⁹⁴ S. Jahandideh, "Iran Chamber of Commerce Survey Report of the Active Private Sectors in Iran Regarding Accession to the WTO [طرح نظرسنجی از فعالان بخش خصوصی] [کشور پیرامون موضوع الحاق ایران به سازمان جهانی تجارت [مرکز تحقیقات و بررسی های اقتصادی اتاق بازرگانی، صنایع، معادن و کشاورزی ایران] 16 (2010)، ایران]".

⁹⁵ Jahandideh (2010), p. 4. (Translation S.A).

⁹⁶ Ibid, p. 5. (Translation S.A).

- Increase in Foreign Investments in Iran

The main purpose of Iran's accession to the WTO is the economic development of Iran. Foreign investment may be conducive to achieving this aim. By acceding to the WTO Iran may attract foreign direct investment.⁹⁷

- Economic development

International trade has an important role in the economic development of countries. Trade not only leads to the international distribution of jobs and expertise among the trading partners, but it also provides for increasing prosperity among them.⁹⁸

- Increase in predictability and clarity of markets

According to WTO law, WTO Members should open their markets to all Members, including the new acceded countries while considering the National Treatment and other relevant rules. This increases the predictability in the markets for the exporters including Iranians.⁹⁹

It should be taken into consideration that the WTO is not a restricted organization to make the accession very dependent on the increasing demands of some of its individual Members. The WTO is a multilateral organization which was established to remove the trade restrictions and promote global trade in the whole world. It bears mentioning that the WTO rules do not only affect its Members but they also have repercussions for non-WTO members such as Iran. Since the WTO is the supreme multilateral forum for discussing policies on trade, non-WTO members are also under its influence. Even though countries like Iran do not enjoy the advantages of membership, they are still affected by it and suffer from the re-direction of trade flows. Therefore, there is no alternative to WTO membership. In addition, trade is important to everyone inside and outside of the WTO because it increases overall economic welfare. Yet politics and political interests do not stop short of trade negotiations and are therefore considered jointly.

⁹⁷ Ibid, p. 6. (Translation S.A).

⁹⁸ Ibid, p. 7. (Translation S.A).

⁹⁹ Ibid, p. 8. (Translation S.A).

There are also other benefits which have been analyzed by economic, trade and law experts, however, discussing them here goes beyond the limited scope of this research.¹⁰⁰ A report addressing Iran's accession to the WTO was issued by Iran's Parliament Research Centre in 2008 indicating to some benefits of accession which are highlighted shortly below.¹⁰¹

- the development of national trade;¹⁰²
- ensuring the stability of commercial treatment by trade partners in export market;¹⁰³
- the ability/possibility of participation in international decision making;¹⁰⁴
- the unification of domestic laws and regulations with international rules.¹⁰⁵

These benefits and purposes, among others, resulted in Iran's application for the accession to the WTO.

1.3.2. Iran's WTO Accession Process

As it was discussed above, after the Second World War the Havana Charter (1948) was drafted to set up the International Trade Organization (ITO). The Havana Charter was signed by 53 countries. Although Iran ultimately did not adopt the Havana Charter of the ITO, it was active during the negotiation process. Iran also signed the document but ultimately Iran's Parliament did not ratify the Charter. Then when the GATT 1947 was adopted, Iran became an observer (16 August 1948). It remained an observer until the end of the GATT's eighth negotiation round. This eighth round, the so-called Uruguay

¹⁰⁰ Some essays on the consequences of Iran's accession to the WTO are: F. Mohaqeqzadeh, "Consequences of Iran's Accession to the WTO on Insurance Industry [آثار الحاق ایران به سازمان جهانی تجارت بر صنعت بیمه]", Iranian Journal of Insurance Research (2005) [فصلنامه صنعت بیمه], pp. 61-86; M. Atrak, "Iran's Accession to the WTO and its Consequence on Iran's Banking System [پیوستن ایران به سازمان تجارت جهانی و تأثیر آن بر سیستم بانکی کشور]", Barnameh Journal (2003) [مجله برنامه], pp. 14-15; A. Dehqani, "Consequence of Iran's Accession to the WTO on Industry Sector of Iran [تأثیر عضویت ایران در سازمان تجارت جهانی بر بخش صنعت ایران]", Nameye Mofid Journal (2009) [مجله نامه مفید], pp. 107-126.

¹⁰¹ S.G. Baghi, "About World Trade Organization (WTO) and Iran's Accession [کلیاتی مرکز پژوهش (Iran's Parliament Research Centre) درباره سازمان جهانی تجارت و الحاق ایران]", (2008), p. 31. (Translation S.A).

¹⁰² Baghi (2008), p. 32. (Translation S.A).

¹⁰³ Ibid, (Translation S.A).

¹⁰⁴ Ibid, (Translation S.A).

¹⁰⁵ (Translation S.A).

Round (1986-1994), resulted in the establishment of the World Trade Organization (WTO).

Similar to many developing countries, Iran (as an observer) was not very active in the GATT negotiation rounds, even though it participated in a few rounds such as the Dillon Round (1960) and the Tokyo Round (1973). It bears mentioning that, due to the adoption of new domestic trade policies in 1990 that were oriented towards trade liberalization, Iran started focusing on the GATT and the benefits of becoming a GATT Contracting Party.¹⁰⁶ In 1991 Iran's Government requested that the Ministry of Commerce undertake the necessary studies. On 17 January 1994, the Council of Ministers formed a committee at the Ministry of Commerce which was composed of delegates from 21 ministries and governmental institutions to evaluate what 'accession' to the GATT would entail for Iran. In 1995, after the WTO was established, the Committee changed its focus to the WTO and Iran's accession to this organization.

The studies undertaken by the Ministry of Trade concluded that Iran should commence WTO accession negotiations. On 5 May 1996, it was agreed by Iran's Council of Ministers that the application for WTO accession should be sent to the WTO. The WTO accession application was formally submitted to the WTO Director General and was filed on 26 September 1996 (WT/ACC/IRN/1). It is stated in the application document that:

The following communication from the Permanent Mission of the Islamic Republic of Iran has been received by the Director-General.

I have the honour to inform you that the Government of the Islamic Republic of Iran has decided to apply for accession to the World Trade Organization under Article XII of the Marrakesh Agreement.

The Islamic Republic of Iran has, for the last several years, embarked on an extensive programme of reconstruction and development leading to expansion of economic relations and trade with its regional

¹⁰⁶ M. Shiroudi, "IRAN: Long Effort to Join World Trade Organization" [ایران: تلاش طولانی], *فصلنامه پژوهش های فصلنامه پژوهش های* Quarterly Economic Research Review [برای الحاق به سازمان جهانی تجارت اقتصادی ایران], 4(2004), pp. 189. (Translation S.A).

and global partners. The Government is, therefore, prepared at this stage to engage in the procedures that follow this application.¹⁰⁷

For five years, Iran's request for accession was not put on the agenda of the General Council for discussion. This was due to political situations such as the opposition of the United States to Iran's accession. It bears mentioning that it has been suggested that the WTO Director General and perhaps the successive chairpersons of the General Council held informal consultations on this matter and that they came to the conclusion that there would be no consensus for putting this request on the agenda. Therefore, they refrained from doing so.¹⁰⁸ Alavi¹⁰⁹ (2010) has coined the phase as the 'no-action mode' to represent this time, which continued until mid-2001.¹¹⁰

After some formal negotiations in the Organization of the Islamic Cooperation (OIC) at its 8th Session in 1997 on the 'expeditious process of accession to the WTO of applying developing countries including the OIC members', Iran renewed its request for accession in 1998.¹¹¹ However, it was still not put on the agenda of the General Council. Therefore, in February 2000 during the United Nations Conference on Trade and Development in Bangkok (UNCTAD-X), Iran's trade representative raised the issue of Iran's accession request after the WTO Director General's (Mike Moore) speech. Iran argued that the consensus rule had been abused within the WTO and Iran's request had been blocked and there had been no explanation for this delay. Moore answered that: *'He had held consultations but still found no consensus to bring the issue before the WTO'*.¹¹²

¹⁰⁷ Accession of Iran, Request for accession pursuant to Article XII, WT/ACC/IRN/1, 26 September 1996.

¹⁰⁸ For further information see: C Raghavan, "Place Iran Accession Request on General Council Agenda," (2000), available at <http://www.twn.my/title/iran.htm>, last visited on 1-10-2016.

¹⁰⁹ S. Jalal Alavi is an Iranian career diplomat who has served at the Mission to the United Nations in Geneva (1998-2002) and was also member of the negotiating team in Iran-EU trade negotiations for a Trade and Cooperation Agreement (2003-05).

¹¹⁰ S.J. Alavi, "Accession of Iran to the World Trade Organization: A Legal-Political Overview", *Iranian Review of Foreign Affairs*, (2010) 1, p. 147.

¹¹¹ M. Jalali-Karveh, "Law and Politics of Iran's Six-Year Old Application for Accession to WTO", *Discourse* (2002) 2, p. 18.

¹¹² Jalali-Karveh (2002), p. 19.

Later in 2000, the Informal Group of Developing Countries (IGDC) addressed Iran's accession request among the difficulties faced by the developing countries to seek WTO accession.¹¹³ At the General Council meeting of December 2000, on behalf of the IGDC, Egypt criticized the failure of the WTO Secretariat to respect the clear and well-established procedures in dealing with accession applications. In its statement to the General Council, Egypt noted:

It is difficult to justify to ourselves and to the public audience that watches us closely our advocacy of the basic principles and objectives of the multilateral trading system, especially the establishment of rule-based, transparent and non-discriminatory trade relations as well as its universality, when our practices sometimes run contradictory to these rules and discriminates against developing countries wishing to become part of that system and respect the obligations it brings along.¹¹⁴

Egypt subsequently formally asked for Iran's request for accession to be put on the agenda of the next meeting of the General Council. A number of developing countries then spoke in support of Egypt's statement.¹¹⁵ Although, due to the United States' request, Iran's accession was not put on the agenda of the next meeting of General Council in February 2001, it was put on the agenda of the meeting in May 2001.¹¹⁶ However, in May and October 2001, the United States blocked Iran's request for accession through a short statement:

The U.S. is not at this stage in a position to consider the establishment of a Working Party that would open the process for Iran to join the WTO.¹¹⁷

¹¹³ Ibid.

¹¹⁴ It bears mentioning that, in the WTO document, the verbs are used in the past tense because it is reporting the meeting, WT/GC/M/61, dated 7 February 2001, Minutes of General Council meeting. Note that Egypt explicitly added that its statement 'in no way presents a challenge to the consensus rule'.

¹¹⁵ Raghavan (2000).

¹¹⁶ Jalali-Karveh (2002), *ibid.*

¹¹⁷ BRIDGES Weekly Trade News Digest, ISSN 1563-003X, Volume 5, Number 35, 16 October 2001, <http://www.ictsd.org>, last visited on 1-10-2016.

Iran's request was again put on the agenda of the meeting of the General Council in July 2001, but it was again blocked. Therefore, at the request of Malaysia, which at that time chaired the IGDC, Iran's request continued to be on the agenda of subsequent General Council meetings. The consensus-building attempts in the General Council to decide on Iran's request failed more than 20 times. Alavi has referred to this as a 'no-decision mode'.¹¹⁸ This continued until the Paris Agreement on 14 November 2004. The Paris Agreement was between the EU3 (Britain, France, and Germany) and the Islamic Republic of Iran on the suspension of Iran's nuclear activities. Accordingly, in February 2005, through the meetings between the United States and the EU3, the United States agreed to drop its objection to Iran joining the World Trade Organization.¹¹⁹ Finally on 26 May 2005, through a decision made in the WTO General Council, Iran was granted observer status to the WTO. A working party to examine Iran's application for accession was also established.¹²⁰

Between 2005 and 2009, due to non-trade issues – such as the controversial political issues regarding Iran's nuclear energy problem and economic sanctions – between Iran and some key Members of the WTO (the United States and the EU), Iran ceased to actively seek its accession process, even though Iran's ministries drafted reports on the country's foreign trade regime in order to prepare for accession.

In November 2009, Iran submitted its Memorandum on the Foreign Trade Regime¹²¹ to the WTO, which was circulated among the WTO Members by the Secretariat. Iran's Memorandum, in its ninth version, had been approved

¹¹⁸ Alavi (2010), p. 147.

¹¹⁹ P. Ingram, "EU3 Negotiations with the Islamic Republic of Iran: Not Out of the Woods Yet and Time is Short, Very Short," *BASIC*, 1 July 2005, p.2, available at <http://www.basicint.org/sites/default/files/PUB010705.pdf>, last visited on 1-10-2016.

¹²⁰ See: http://www.wto.org/english/thewto_e/acc_e/ai_iran_e.htm, last visited on 1-10-2016.

¹²¹ A Memorandum on the Foreign Trade Regime is a formal report from an acceding country to the WTO on its domestic economic and trade regime. In such a report, many subjects are discussed, such as the import and export policies, laws and regulations, trade barriers, and the protection of intellectual property rights. For further information see the relevant section in this chapter (section 1.2. General Information on Accession to the WTO).

by Iran's Council of Ministers on 18 October 2009. The WTO Members' questions on Iran's Memorandum were sent to Iran in 2010. These questions were forwarded by the Iranian Government to 55 domestic institutions, organizations and ministries in Iran to be examined and answered. Thereafter, a new Committee composed of the relevant ministers chaired by the Trade Minister was formed by the Council of Ministers to support and prepare Iran's accession to the WTO and to adopt the necessary decisions in this regard. It bears mentioning that the WTO Working Party on the accession of Iran has not yet met and its chairman has not yet been appointed by the WTO General Council.¹²² The lack of progress in the accession process of Iran was, as mentioned above, due to the deterioration of the relations of Iran with most key WTO Members (including the United States and the EU) in recent years (over the nuclear energy issue) and the economic sanctions imposed as a result. This was also why the EU stopped its support for Iran's accession.

1.3.3. Iran's WTO Accession Prospects

After Iran's progress in its accession process to the WTO, it bears mentioning that when the working party's chairman is appointed, in parallel with the work undertaken by the working party, individual WTO Members will engage with the applicant country (Iran) in bilateral talks on tariff rates and specific market access commitments as well as other trade-related issues. When the bilateral negotiations and the multilateral talks are concluded, the working party will send its report and a draft protocol of accession (including lists of the applicant country's commitments) to the General Council. As mentioned earlier, the General Council can only adopt a decision on a country's accession if there is consensus on such accession.¹²³

¹²² Under the WTO rules on the accession process, the mandate of an accession working party (which includes all WTO Members) is to check whether the applicant country's regulations and practices affecting international trade are fully consistent with WTO law. For further information see the relevant section in this chapter, section 1.2. (General Information on Accession to the WTO).

¹²³ For further information see the World Trade Organization website at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm, last visited on 1-10-2016.

Iran's accession process shows that sometimes the required consensus in the General Council cannot be attained. The reasons for such obstacles may not only be found in the legal or trade regime but can also be of a political nature. In the case of Iran, the later element was of particular importance even though both legal and trade-related impediments exist and obstruct the accession process. The World Trade Organization has been established to '*provide the common institutional framework for the conduct of trade relations among its Members*'.¹²⁴ However, there are also non-trade concerns and factors which are closely involved in performing and promoting the negotiations and decision making on accession of the applicant countries. Political considerations can sometimes render the accession process very difficult when non-trade related demands are raised in the context of the accession negotiations. Therefore, decisions on accession are not only based on trade policy issues but may relate to much broader political issues. Accordingly, the difficulties of Iran's accession are due to domestic and external problems which have played an important role in prolonging its accession process to the WTO.

The important domestic problems are due to difficulties in the liberalization and privatization process of trade and investment in Iran. These difficulties have led to very slow progress in the required level of trade barrier reductions to join the WTO. However, some of these domestic problems have been the result of international, multilateral and bilateral sanctions against Iran. The resolutions adopted by the United Nations Security Council, decisions made by the European institutions and restrictive measures taken and generously enforced by a number of countries have aimed to deal with political issues such as Iran's nuclear power developments and human rights matters. For instance, United States unilateral restrictions were first designed and enforced in 1979 following the seizure of this country's embassy in Iran.¹²⁵ The restrictions greatly influenced Iran's various industries such as: the energy/petroleum industry, banking (Central Bank of Iran and international financial transactions), the shipping industry, insurance, financing trade, etc.

¹²⁴ Article II:1 of the WTO Agreement.

¹²⁵ For further information see the website of United States Department of State on Iran sanctions at: <http://www.state.gov/e/eb/tfs/spi/iran/index.htm>, last visited on 1-10-2016.

On 14 July 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union (EU), and Iran reached a Joint Comprehensive Plan of Action (JCPOA) which resulted in lifting most restrictions on Iran's nuclear issue.

To accelerate Iran's accession process to the World Trade Organization, Iran needs to overcome all existing impediments, including the legal ones. There are some legal impediments to Iran's accession which should be recognized and then removed before and during the multilateral and bilateral negotiations. It bears noticing that most non-trade impediments such as the political impediments are not easily resolved, but they may be resolved over time. Once they are resolved and the political environment for Iran's accession has improved, it is important to have already resolved the potential legal impediments so as to enable a swift accession of Iran to the WTO. Independent of the political situation, a legal analysis of the obstacles for WTO accession is therefore most valuable.

After discussing the current position of Iran in its accession process to the WTO, there are some general rules which should be introduced. These rules play an important role in the accession to the WTO and also in recognizing its problems and are therefore presented briefly in the next section.

1.4. Iran's Obligations under WTO Law

There are some obligations under the WTO agreements which should be undertaken for Iran's accession to the WTO. These obligations are presented in general (1) and in specific (2) discussions as follows.

1.4.1. General Obligations

The general obligations include the rules provided in the WTO multilateral agreements, sometimes the rules of plurilateral agreements and sometimes even beyond the WTO law.

As regard to the WTO multilateral agreements, Article XVI:4 of the WTO Agreement provides that: Each Member shall ensure the

conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements.¹²⁶

As is mentioned in this Article, the domestic system of WTO Members should be in conformity with the WTO agreements. Therefore, a country that wants to join the WTO and become a Member should bring its laws, regulations and administrative procedures into consistency with the WTO rules which are stated in WTO agreements. The WTO agreements include, *inter alia*, rules on trade in goods, services, trade related to intellectual property rights, and disputes settlement mechanisms.

Although the plurilateral agreements are not included in the framework of Article XVI:4, the acceding countries may be requested to accept WTO-plus obligations and WTO-minus rights also.¹²⁷ This can be imposed upon the acceding countries on the basis of Article XII:1 of the WTO Agreement which provides:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.¹²⁸

Article XII:1 includes the term: '*on terms to be agreed between it and the WTO*' which is taken by some countries as imposing some extra (sometimes even non-trade related) demands on the acceding countries. This interpretation of Article XII:1 has taken the flexibility of WTO accession process towards a kind of WTO-plus commitments¹²⁹ that has made the accession process too demanding for applicant countries. The WTO-plus and WTO-minus rights

¹²⁶ Article XVI:4 of the WTO Agreement.

¹²⁷ For instance, in Russia's accession to the WTO, this country experienced significant pressure from the United States and the EU to accept plurilateral agreements such as the Agreement on Trade in Civil Aircraft. For further information see: A.E. Appleton, and M.G. Plummer *The World Trade Organization: Legal, Economic and Political Analysis*, vol. 1 (Springer US, 2007), p. 294.

¹²⁸ Article XII:1 of the WTO Agreement.

¹²⁹ Williams (2008), p.50.

usually also result in a significant prolongation of the accession process. The WTO-plus and WTO-minus rights have been criticized by a number of WTO experts and scholars.¹³⁰ As discussed above, sometimes the WTO-plus obligations have led to the view that accession to the WTO can be a means to impose non-WTO related requirements on applicants, such as resolving some political concerns. For instance, in 2004 the EU³ (France, Germany and the United Kingdom) reached an agreement with Iran on nuclear energy issues. One of the paragraphs of this agreement provided that:

Once suspension has been verified, the negotiations with the EU on a Trade and Cooperation Agreement will resume. The E₃/EU will actively support the opening of Iranian accession negotiations at the WTO.¹³¹

Although this agreement was intended to support the accession of Iran to the WTO, it only resulted in Iran being granted observer status in the WTO in 2005.

In addition to the substantive rules provided for in the agreements annexed to the WTO Agreement, there are also some general rules in the WTO Agreement, among which the 'single undertaking principle' is the rule which directly affects the accession process of the acceding countries like Iran.

1.4.2. Single Undertaking Principle

As discussed, there are some general obligations which can prolong Iran's accession to the WTO. However, there are also some specific obligations, such as the single undertaking principle which can block Iran's accession. This obligation is presented below.

¹³⁰ For instance see: O. Cattaneo and C.A.P. Braga, "Everything You Always Wanted to Know about WTO Accession (but Were Afraid to Ask)," *Policy Research Working Papers* (World Bank, 2009), at: <https://books.google.nl/books?id=BvsakgEACAAJ>, last visited 1-10-2016.

¹³¹ Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November 2004, INFCIRC/637, International Atomic Energy Agency, for the full text see: <http://www.iaea.org/sites/default/files/publications/documents/infcircs/2004/infcirc637.pdf>, last visited on 1-10-2016.

The single undertaking principle is taken from Article II:2 of the WTO Agreement which states:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.¹³²

According to this Article, the single undertaking principle means 'take it all, or leave it all'.¹³³ Later the single undertaking principle was further defined by the WTO Appellate Body in the first case before it on Brazil - Desiccated Coconut (1997):

Unlike the previous GATT system, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a 'single undertaking'. Article II:2 of the WTO Agreement provides that the Multilateral Trade Agreements in Annexes 1, 2 and 3 are "integral parts" of the WTO Agreement, binding on all Members.¹³⁴

This interpretation of Article II:2, which is also defined as an 'inseparable package of rights and disciplines',¹³⁵ directly relates to the accession to the WTO. That is why Iran should take this principle into consideration in its accession process. This is tantamount to the obligation of accepting the entire WTO Agreements as a package, even though some of the provisions could be in conflict with its constitutional rules. This will be analyzed in detail in the subsequent chapters.

It bears mentioning that, in addition to the above term, there are at least two other terms subject to interpretations contained in Article II:2: 'common context' and 'coexistence'.

The term 'common context' refers to the harmony among all WTO agreements. As it is mentioned in WTO Appellate Body Report, Korea -

¹³² WTO Agreement Article II:2.

¹³³ Presentation of Mr. Ahmad Thougani Hindawi to the WTO General Council on 29, 30 and 31 January 2013 (Appointment of the next Director general- Meeting with candidate, WTO Document: JOB/GC/34- p.6.

¹³⁴ See the WTO Appellate Body Report on Brazil – Desiccated Coconut (1997), p.12, see the WTO document WT/DS22/AB/R.

¹³⁵ See the WTO Appellate Body Report on Argentina – Footwear (EC) (2000), para. 81.

Dairy, all agreements, including the rules, should be read and interpreted as a whole. The WTO Appellate Body stated:

In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.¹³⁶

This view was also stressed by the Panel in US-Poultry (China).¹³⁷

The third term 'coexistence' is also taken from the dispute settlement cases in the DSS. Under this interpretation, the WTO Agreement's rules do not override each other. In the WTO Panel Report on Canada - Periodicals it is stated that:

The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plane in the WTO Agreement, without any hierarchical order between the two.¹³⁸

¹³⁶ WTO Appellate Body Report, Korea – Dairy, para. 81.

¹³⁷ The WTO Panel in its Report on US – Poultry (China), para. 7.466 states: 'in accordance with Article II:2 of the WTO Agreement, the multilateral trade agreements included in its Annexes 1, 2 and 3 must be interpreted as a whole, and in a manner that gives meaning to all of them harmoniously.'

¹³⁸ WTO Panel Report, Canada — Periodicals, para. 5.17.

This interpretation was also mentioned in the Panel Report on EC – Trademarks and Geographical Indications (Australia).¹³⁹

However, it should be noted that the WTO rules do not override each other cannot affect the relationship between the WTO Agreement and its annexes. In other words, the WTO Agreement, as it is mentioned in its Article XVI:3, prevails over its annexes:

In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.¹⁴⁰

This Article states that the WTO Agreement prevails in the case of conflict with other WTO agreements. This can be viewed to be inconsistent with the above-mentioned interpretation of the term ‘coexistence’. It bears mentioning that, until now, there have not been any interpretations introduced in the WTO dispute settlement cases with regard to Article XVI:3.

1.4.3. Criticism of the Single Undertaking Principle

The precise origin of the single undertaking principle is unclear, but it is assumed that this principle might have been derived from a domestic legal system.¹⁴¹

The single undertaking principle is generally regarded to be a new legal principle that was introduced into the multilateral legal system in the Uruguay Round to restrict the right of choice for both the original as well as acceding countries to the World Trade Organization.¹⁴² Das claims that this principle is a basic formative principle of the multilateral regime. He discusses that this concept was used in the Punta del Este Ministerial Declaration in 1986, which was the opening declaration of the Uruguay Round, as follows:

¹³⁹ WTO Panel Report, EC — Trademarks and Geographical Indications (Australia), para. 7.244.

¹⁴⁰ WTO Agreement Article XVI:3.

¹⁴¹ A detailed discussion of its exact origin goes beyond the scope of this book and will not be attempted here. However, a short discussion is in order.

¹⁴² It should be considered that many complex negotiations are conducted on this basis of the single undertaking principle.

The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.¹⁴³

Moreover, Wolfe examined the precedents of the single undertaking principle and argues that this rule was taken from the 1960s Kennedy Round's simultaneous negotiations on 'issues of interest to all participants' including goods, agriculture, and LDC preferences.¹⁴⁴ Accordingly, it is worth mentioning that this principle first came to be applied in international trade law to support the benefits of all parties, including the developing countries, involved in a round of negotiations.

It has also been suggested that this principle has been used in the Uruguay Round in two different ways:

During the Uruguay Round negotiations the concept of a single undertaking was widely used. It refers to two different concepts: the 'single political undertaking,' referred to the method of negotiations ("nothing is agreed until everything is agreed," which was not inconsistent with the possibility of early implementation (early harvest)); and the 'single legal undertaking' which refers to the notion that the results of the negotiations would form a "single package" to be implemented as one single treaty. Both concepts are reflected in the Part I:B(ii) of the Uruguay Round Declaration.¹⁴⁵

The single undertaking principle was very successful in the Uruguay Round to set up the World Trade Organization and that is why it was used in proclaiming the next Round declaration. On 20 November 2001, the WTO Members formed the Doha Development Round negotiations by using this successful tool as well. Therefore, the principle of single undertaking was again echoed in the Paragraph 47 of the WTO Doha Ministerial Declaration:

¹⁴³ D.K. Das, *The Evolving Global Trade Architecture*, Reprint ed. (Edward Elgar Pub., 2007), p. 66.

¹⁴⁴ R. Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor", *Journal of International Economic Law* (2009) 12, p. 839.

¹⁴⁵ J.P. Trachtman, *The International Economic Law Revolution and the Right to Regulate* (Cameron May, 2006), p. 74.

With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.¹⁴⁶

As the cornerstone of the Doha Development Round negotiations, the single undertaking principle was supposed to bring about a similar success as it had brought to previous multilateral trade negotiations. It contributed, however, to the failure of the Doha Round. The slow progress was due to an imbalance between the north-south negotiators' benefits in the various negotiations that dragged on for several years and is still ongoing.

Until the 10th ministerial conference in Nairobi on 15-19 December 2015, the Doha Round could not be concluded and could not achieve any of its original objectives. Even though the Doha agenda continues in WTO Members' negotiations, the Nairobi conference reached this conclusion that the form of negotiations will differ going forward:

We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations. We acknowledge the strong legal structure of this Organization.¹⁴⁷

WTO Members, therefore, through this declaration moved the 'single undertaking approach' away from their future trade negotiations.

¹⁴⁶ Paragraph 47 of the WTO DOHA Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1, http://www.wto.org/english/thewto_e/minist_e/minor_e/mindecl_e.htm, last visited on 1-10-2016.

¹⁴⁷ Nairobi Ministerial Declaration (19 December 2015), Paragraph 30, WTO document: WT/MIN(15)/DEC.

Some critics believe that the single undertaking merely slows down multilateral liberalization.¹⁴⁸ Others think it foolish to ask all Members to accept the same obligations.¹⁴⁹ Overall, it can be concluded that the single undertaking principle has lost its usefulness and that there might be a consensus to eliminate it from the future multilateral trade negotiations due to the fact that the position of developing countries is different from those of the Uruguay Round era. While developing countries have always been a heterogeneous group, their different objectives started to become relevant during the negotiations. For instance, the BRICS countries, (including Brazil, the Russian Federation, India, China and South Africa), form a group of developing countries that have different needs than other developing countries. More importantly, the interests of each of the BRICS countries also differ significantly. The roles that these developing countries play in negotiations within the international trade scene are also different from those in the past.

The present criticism on the 'single undertaking approach' is somewhat too 'simple'. Before the start of the Doha Round, Members had already been negotiating on the further liberalization of trade in services as well as on trade in agricultural products. These negotiations did not get anywhere because, in each of the negotiations, either the developed or the developing countries would have to make major concessions. Only by taking on both negotiations in a round and adopting a 'single undertaking approach' could one hope for a balanced outcome in which all Members would both give and receive. People tend to have short memories as to why the 'single undertaking' approach was taken.

¹⁴⁸ For critiques of the Single Undertaking, even calls for its elimination, see especially W. Martin and P. Messerlin, "Why Is It So Difficult? Trade Liberalization under the Doha Agenda: Trade Liberalization under the Doha Agenda", *Oxford Review of Economic Policy* (2007) 23, p. 359. See also R. Howse, "WTO Governance and the Doha Round," *Global Economy Journal* (2005), available at www.bepress.com/gej, last visited on 1-10-2016, p. 3; P.I. Levy, "Do We Need an Undertaker for the Single Undertaking? Angles of Variable Geometry," in B.M. Hoekman & S.J. Evenett (eds.), *Economic Development and Multilateral Trade Cooperation* (Palgrave Macmillan and World Bank, 2005), p. 430.

¹⁴⁹ J.M. Finger, "Implementing the Uruguay Round Agreements: Problems for Developing Countries", September 2001, available at: http://policydialogue.org/files/publications/Implementing_Uruguay_Round_Finger.pdf, last visited on 1-10-2016, p. 11.

A question which can be raised here is whether it would be possible that countries would be allowed to join the WTO without signing up to all WTO multilateral agreements (and e.g. opting out of the DSU).

Despite the fact that the single undertaking principle is now discredited among those who have been endeavoring to conclude the Doha Development Round in order to expand the multilateral system of 'globalization' and the trade 'liberalization', it is undeniable that the principle still remains in the WTO Agreement and acceding countries shall observe it in their accession process, under Article II(2) of the WTO Agreement,¹⁵⁰ and based on the interpretations by Appellate Body in *Brazil — Desiccated Coconut*¹⁵¹ and *Argentina — Footwear (EC)*¹⁵²:

All WTO Members are bound by all the rights and obligations in the WTO Agreement and its Annexes 1, 2 and 3.¹⁵³

This means that, in its accession to the World Trade Organization, Iran must simultaneously accede to the WTO Dispute Settlement Understanding, and therefore accept the *mandatory* (compulsory) and exclusive jurisdiction of the WTO panels, the Appellate Body and arbitration to govern in the case of any dispute arising with regard to the WTO agreements.

After discussing the single undertaking principle, which can be one of the key impediments of Iran's accession to the WTO, some general problems of Iran's accession process are also discussed below.

1.5. Problems of Iran in its Accession to the WTO

There are a number of problems which obstruct or prolong Iran's accession process to the WTO. These include the Government's influence on the

¹⁵⁰ Article II:2: The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

¹⁵¹ Analytical Index of the Marrakesh Agreement
http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#article1, last visited on 1-10-2016.

¹⁵² Ibid.

¹⁵³ Appellate Body Report on *Brazil — Desiccated Coconut*, Analytical Index of the WTO Agreement.

economy that limits the private sector. This problem (as discussed in this chapter (in section 1.3.1 Benefits of Accession for Iran) and also in chapter three on Iran's National Expediency Council and the general strategies for trade liberalization) cannot be removed in a short period of time.

As mentioned above, it is stated in the WTO Agreement, 'each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements.'¹⁵⁴ Therefore, to join the WTO, Iran shall amend its domestic legal system to make it consistent with the WTO Multilateral Agreements.

To achieve this required consistency with WTO rules, trade barriers on goods, services and intellectual property rights shall be removed. To remove these, Iran's laws, regulations and administrative procedures must be amended. Because such amendments affect other elements of the legal and trade system, this may entail a substantial reform of the domestic legal system of Iran. However, a mere amendment of the legal system on paper cannot promptly result in a higher level of trade liberalization and the full removal of the trade restrictions. It is believed that real progress in trade liberalization needs a reasonable period of time to be stabilized, otherwise it can lead to economic crisis due to a lack of the required development capacity of the country.¹⁵⁵

In other words, to join the WTO, the applicant is not supposed to promptly reach a high level of development in its trade and economy. That is why the original Members of the WTO adopted some transitional periods for the acceding countries, some of which have expired. Even though the transitional period is necessary for Iran's accession, in light of other countries' accession experience, it would be difficult for it to be accepted by the WTO Members in Iran's accession process. Therefore, Iran is expected to make sure the basic level of barriers which restrict the trade in goods, services and intellectual

¹⁵⁴ WTO Agreement Article XVI:4.

¹⁵⁵ For instance, adoption of the General Policies of Principle 44 on privatization by Iran's National Expediency Council, which was followed by adoption of several legislations and regulations by the Parliament and the Government, was expected to bring liberal trade and stable economy for Iran. However, Iran so far has been involved in many financial and economic crises and the expected privatization has not been achieved yet.

property rights be removed within a short period of time. After this, the country can ensure the proper implementation of the non-discrimination rules of the MFN and National Treatment and other WTO obligations.

In Iran, the national strategies for liberalization of trade have been adopted and applied by several governmental administrations for decades. However, the most important ones were drafted and adopted by Iran's National Expediency Council in 2005. They were also decreed and announced by the Leader. These strategies, as mentioned before, are called: 'General Policies of Principle 44 pertaining to the Constitution'.¹⁵⁶ These General Policies are important because Principle 44 of Iran's Constitution has restricted the private sector's participation in Iran's economy, especially in the infrastructure industries.

To remove this restriction contained in Principle 44, the General Policies of Principle 44 on privatization¹⁵⁷ was adopted and enforced. However, after a decade, the Government and state-owned companies still have the exclusive role in most industries. The General Policies have not ever been expected to lead to a fast privatization.¹⁵⁸ Even though privatization has made noticeable progress in Iran, it cannot be claimed that there is fair competition between the private and governmental sectors in Iran. There are laws, regulations and administrative procedures that have been adopted and enforced to implement the General Policies like privatization. However, the private sector, for instance, is still not practically developed to be granted a more active role in the market. Although it cannot be asserted that there is any inconsistency between the legal/economic system of Iran and the mentioned General Policies, it cannot be claimed that the privatization has been fully successful. In fact, contrary to the adopted laws, regulations and administrative procedures, it is a different story in practice. This is why it should be taken

¹⁵⁶ [سیاست های کلی مربوط به اصل 44 قانون اساسی جمهوری اسلامی ایران], (Translation S.A).

¹⁵⁷ For further information see the policies at: <http://irandataportal.syr.edu>, last visited on 1-10-2016.

¹⁵⁸ Article A (1) of the General Policies of Principle 44 states that 'the Government does not have the right to new economic activity outside [those activities] listed in the beginning of Principle 44. This Article has provided an annual decrease of 20 percent for the Government's activity. For further information see the full text of the policies at: <http://irandataportal.syr.edu>, last visited on 1-10-2016.

into account that the mere adoption of laws, regulations and administrative procedures alone cannot make the system of an acceding country like Iran fully consistent with the WTO agreements. For instance, one can consider the prolonged process of China in its accession to the WTO, which required new laws for the protection of intellectual property rights, and now in its post-accession phase the level of TRIPS compliance in China.¹⁵⁹ Therefore, the experience of similar acceded countries cases such as China should be taken into consideration in Iran's accession process and in granting reasonable transition periods to this country by the WTO Members for achieving full consistency between its local system and WTO law.

Another important point which should be mentioned is that there are some impediments in Iran's legal system which do not allow for laws, regulations and administrative procedures to be adopted in a few fields. These legal impediments should also be taken into account in Iran's accession to the WTO.

1.6. Legal Impediments to Iran's Accession to the WTO

To join the WTO Iran needs to amend its domestic system.¹⁶⁰ However, where the amendments conflict with the Constitution, they would be rejected by the constitutional system of Iran. In other words, when the amendments are adopted in Iran's Parliament, their constitutionality should be checked by the Guardian Council. The Guardian Council¹⁶¹ is akin to a constitutional court which examines the constitutionality of laws and regulations. Therefore, if an amendment is in conflict with Iran's Constitution, it will be blocked and sent back to the Parliament. There are two important rules in the WTO agreements, in relation to which amendments to Iran's legal system

¹⁵⁹ For the level of intellectual property rights protection in China see the relevant disputes in the WTO. For instance, DS 362 China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights; DS 372 China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers.

¹⁶⁰ It bears considering that the WTO allows any Member a free choice regarding its domestic system. What the WTO requires is that all domestic legislation/regulation is WTO consistent. This can result into amendments.

¹⁶¹ The Guardian Council will be discussed in chapter three, section 3.5.4.2. Guardian Council.

would likely be lacking constitutionality: the TRIPS Agreement and the Dispute Settlement Understanding (DSU). Each will be addressed in turn.

- The TRIPS Agreement

This Agreement includes rules on the protection of copyrights and neighboring rights; and industrial rights. Iran is a member of most industrial property rights treaties such as the Paris Convention.¹⁶² In addition, on 12 February 2008, a law on '*Patents, Industrial Designs and Trademarks Registration Act*'¹⁶³ was adopted which includes a high level of protection for the industrial property rights.¹⁶⁴

However, the protection of copyrights and neighboring rights is controversial in Iran. That is why Iran is not yet a member of the Berne Convention¹⁶⁵ for the Protection of Literary and Artistic Works. Under Principle 4 of Iran's Constitution, all laws and regulations shall not be in conflict with Islamic rules.¹⁶⁶ As the Islamic rules have been silent about the protection of copyrights, some Islamic experts have not recognized the protection of the mentioned rights in Iran, even though a limited protection is available.¹⁶⁷ Therefore, any amendment for a better protection of copyrights and neighboring rights might be futile due to the problem of Constitutionality.

¹⁶² Paris Convention Paris Convention for the Protection of Industrial Property, for the full text see: http://www.wipo.int/treaties/en/text.jsp?file_id=288514, last visited on 1-10-2016.

¹⁶³ [قانون ثبت اختراعات، طرح‌های صنعتی و علائم تجاری], (Translation: WIPO).

¹⁶⁴ For further information see the full text at:

<http://www.wipo.int/wipolex/en/details.jsp?id=7706>, last visited on 1-10-2016.

¹⁶⁵ Berne Convention for the Protection of Literary and Artistic Works, for the full text see: <http://www.wipo.int/treaties/en/ip/berne>, last visited on 1-10-2016.

¹⁶⁶ Iran's Constitution, Principle 4 states: 'All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle governs all the articles of the constitution, and other laws and regulations. The determination of such compatibility is left to the Fiqaha of the Guardian Council.' (Translation S.A).

¹⁶⁷ There are some laws on the protection of copyrights which mostly were adopted before Islamic Revolution and the enforcement of Iran's Constitution. For instance, the Act for Protection of Authors, Composers and Artists Rights was adopted and enforced on 12 January 1970. However, the disputes on rights covered by this laws and regulation lack enough protection and recognition by Iran's courts.

Recently, on the basis of new positive views of some Islamic experts for the protection of copyrights and neighboring rights, a bill is adopted by the Government. This bill is called 'The Bill for the Protection of Intellectual Property'¹⁶⁸ and has been submitted by the Government to the Parliament on 7 January 2015. It was referred to the Judicial and Legal Committee (as the main Committee) to be discussed. Due to the fact that there are Islamic experts who support the protection of copyrights now, it is hoped that the draft will not be declared unconstitutional by the Guardian Council. Therefore, if the Guardian Council accepts the view that the bill is not in conflict with Islamic rules and therefore Principle 4 of the Constitution, the bill can be adopted and enforced. As it is expected that the legal impediment of Iran's accession to the WTO on TRIPS might be removed by the possible adoption of this bill in the Parliament, this legal impediment is not discussed in this dissertation.

- Dispute Settlement Understanding (DSU)

As mentioned earlier, due to the single undertaking principle, accession to the WTO shall be done only through accession to the WTO Agreement and all its annexes. The Dispute Settlement Understanding (DSU) is also one of the WTO Agreement annexes. The WTO Dispute Settlement System (DSS) has an exclusive and mandatory jurisdiction over all the covered WTO agreements.¹⁶⁹ Therefore, if there is a dispute about the WTO agreements between its Members, it must be resolved in the DSS and only through the DSS mechanisms.

Iran's Constitution Principle 139 contains some requirements on resolving disputes between Iranian and non-Iranians about public and state property or referring it to arbitration. Referral of such disputes to the dispute settlement system should be first approved by the Parliament. This means that after Iran joins the WTO, disputes on the WTO agreements between Iran and other WTO Members can be resolved in the WTO if Iran's Parliament allows this. In addition, under the Principle 139, the Parliament's approval of the referral of disputes to the dispute settlement systems like the DSS should be on a

¹⁶⁸ [لایحه حمایت از مالکیت فکری], for full text of the bill see:

http://rc.majlis.ir/fa/legal_draft/show/920182, last visited on 1-10-2016.

¹⁶⁹ This will be discussed in the subsequent chapter.

case-by-case basis. Therefore, Iran's obligation after its accession to the WTO to resolve its disputes with WTO Members about the WTO agreements would be in conflict with the constitutional requirements stated in Principle 139. If Iran's Parliament adopts laws and regulations to remove the above-mentioned legal conflict to make its system consistent with the WTO DSU, they will be rejected and blocked by the Guardian Council because of a lack of constitutionality. Therefore, this legal conflict would constitute a problem for Iran's accession to the WTO. This problem is analyzed in detail in this dissertation.

1.7. Conclusion

In this chapter it was presented how, after the Second World War, some countries attempted set up an international organization on trade. However, the negotiations only resulted in a multilateral agreement on the reduction of tariffs on trade in goods, the GATT 1947, which gradually developed in the course of the years into a *de facto* international organization. In 1995, this *de facto* organization was, as a result of the Uruguay Round negotiations, replaced by the World Trade Organization. The World Trade Organization Agreement did let the contracting parties of GATT 1947 and the European countries become the original Members of the WTO. It also adopted some general rules to enable other countries accede to the WTO. The general procedural and substantial rules on accession were introduced in this chapter.

Although Iran applied for the accession to the WTO one year after it was established in 1996, it is not a WTO Member yet. There are some problems which have blocked Iran's accession process.

What benefits the WTO membership can bring for Iran and how Iran decided to apply for the WTO accession were also discussed in this chapter. The current position of Iran in the WTO accession and its problems were mentioned and a brief discussion on general obligations of accession to the WTO was provided.

Among the problems of Iran's accession, a legal conflict was introduced. This legal impediment which originates from the conflict between Iran's Principle 139 on dispute settlement and the dispute settlement system of the WTO (DSS) will be discussed in further chapters.

THE WTO DISPUTE SETTLEMENT SYSTEM AS A LEGAL IMPEDIMENT TO IRAN'S ACCESSION TO THE WTO

The next chapter discusses the dispute settlement mechanisms of the WTO and where the conflict comes from.

Chapter 2: WTO Dispute Settlement System (DSS)

2.1. Introduction

The WTO accession process was described in the preceding chapter and this chapter describes the WTO dispute settlement system and presents the necessary background for the remainder of the dissertation.

This chapter discusses whether the jurisdiction of the WTO dispute settlement system (DSS) is compulsory. The legal conflict between Iran's Constitution and the WTO Dispute Settlement Understanding (DSU) comes back to the mandatory participation of Iran in disputes before the WTO dispute settlement system's institutions. If this obligation exists under the Dispute Settlement Understanding (DSU) for WTO Members and Iran's Parliament does not authorize the participation of Iran in a dispute settlement process, a conflict would arise between the DSU and Iran's domestic system.

In this chapter, first the historical background and the nature of the WTO DSS are introduced. Thereafter, the core elements of the DSS as a dispute settlement system, including its key features, its scope, who can invoke it, the mechanisms it employs, and how it operates are described. Given its importance for the legal analysis of Iran's accession, a section is devoted to the question if the WTO DSS can be qualified as a judicial or quasi-judicial system.

After describing the nature of the DSS and its mechanisms, the single undertaking principle is mentioned briefly. This principle prevents Iran from opting-out of the DSU even if there is a conflict between its domestic system and the DSU. This point deserves particular attention because it can constitute a legal conflict that impedes Iran's accession to the WTO.

Finally the problem of implementation of Principle 139 of Iran's Constitution in the WTO accession process is mentioned very briefly. This issue will be discussed in detail in later chapters.

2.2. The Historical Background of the DSS

This section presents the historical background of the DSS and demonstrates its development from a power-based system to a rules-based one.¹ It bears mentioning that the WTO dispute settlement system itself did not develop from a power-based system to a rules-based one. The GATT dispute settlement system developed from a power-based system to a rules-based one and the creation of the WTO dispute settlement system can be seen as the most recent step in this process – at the same time replacing the GATT dispute settlement system with the WTO dispute settlement system.

An appreciation of the background of the law can give a better understanding of the real nature of the DSS mechanisms, which can be helpful to find out whether the DSS is a judicial or quasi-judicial system (a system including both rules-based and power-based mechanisms) – an important point of consideration regarding Iran's WTO accession.

The WTO dispute settlement system originated from rules that were already contained in GATT 1947. The GATT 1947 included two articles on dispute settlement which are Articles XXII and XXIII. These Articles did not define detailed procedures to settle disputes. This GATT dispute settlement started its work as a power-based system and, over the course of several decades, transformed gradually into a rules-based system. In the beginning of the working of GATT, the Contracting Parties preferred to resolve their disputes through negotiations rather than by means of applying strict legal rules.

For many years after the GATT entered into force,² it was unclear whether disputes under Articles XXII and XXIII of the GATT 1947 should be handled either through a working party, composed of the GATT Contracting Parties, or by a panel of independent experts.³ In the literature, the working party is

¹ W.J. Davey, "The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges", *Journal of International Economic Law* (2014) 17, p. 685.

² Technically speaking, the GATT itself never entered into force. It was always applied through a protocol of provisional application.

³ Paragraph 1 of the Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which was adopted on 28 November 1979, GATT

associated with a power-based approach, while the panel is associated with a rules-based approach.⁴ Only in 1966, the Contracting Parties adopted a decision which established *'the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties'*.⁵ Pursuant to this decision, the Director-General was asked to *'employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure'*.⁶ However, the emphasis again was on negotiations and, if a mutually agreed solution could not work, a panel of experts could assist the Contracting Parties (the GATT 1947 Council) to give recommendations or rulings to the disputing parties based on Article XXIII:2.⁷

The customary practice of the GATT 1947 in the field of dispute settlement, as well as the 1966 decision,⁸ could not avoid the blocking of the establishment of a panel by the responding party when the consultations did not proceed satisfactorily. This was the result of the consensus requirement

Document: L/4907, https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf, last visited on 1-10-2016.

- 4 At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by Contracting Parties mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT, see the footnote to the Annex of Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf, last visited on 1-10-2016.
- 5 GATT Document: BISD 14S/18 (1966). Also in Paragraph 2 of the Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which was adopted on 28 November 1979, GATT Document: L/4907, https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf, last visited on 1-10-2016.
- 6 Paragraph 2 of the Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which was adopted on 28 November 1979, GATT Document: L/4907, https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf, last visited on 1-10-2016.
- 7 Paragraph 3 of the Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance which was adopted on 28 November 1979, GATT Document: L/4907, https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf, last visited on 1-10-2016.
- 8 https://www.wto.org/english/tratop_e/dispu_e/dispute_settlement_cbt_e/a2s1p1_e.htm, last visited on 1-10-2016.

for a decision on the establishment of a panel. Therefore, the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was adopted in 1979 to, *inter alia*, solve this issue. Even though the respondent could no longer block or delay a request for a panel establishment, due to the consensus requirement for decisions on the adoption of panel reports, other problems, such as for example the threat of non-adoption of the panel's report in the GATT Council, still remained.⁹

Following the meetings of the Trade Negotiations Committee at the Ministerial level in December 1988 and at the level of high officials in April 1989, the Contracting Parties to the GATT, the 'Decision on Improvements to the GATT Disputes Settlement Rules and Procedures' was adopted in 12 April 1989 to remove some of the remaining shortcomings. The 1989 revision strived to solve the problems of (i) the non-adoption of panel reports; (ii) added arbitration to the system; (iii) emphasised the provision of technical assistance by the Secretariat to the developing countries; and (iv) introduced a surveillance mechanism to monitor the implementation of recommendations and rulings.¹⁰ It bears mentioning that the whole revision was aimed giving the dispute settlement system a more rules-based nature. However, the problem of the non-adoption of panel reports was not resolved by this decision. This problem was only resolved in the WTO Dispute Settlement Understanding, agreed on in 1994.

The GATT dispute settlement system thus evolved over the years from a negotiation/power-based system towards a rules-based system that was lauded to be 'the most developed dispute settlement system in any existing treaty regime' in its time.¹¹

To find out how successful the GATT 1947 dispute settlement system has been, it is worth considering that, in comparing the GATT 1947 to other multilateral dispute settlement systems, the number of cases which were dealt

⁹ ML Busch and E Reinhardt, "The Evolution of GATT/WTO Dispute Settlement," 2003, p. 150.

¹⁰ For further information see the WTO website at:
http://www.wto.org/english/tratop_e/dispu_e/dispute_settlement_cbt_e/a3s1p1_e.htm,
last viewed on 1-10-2016.

¹¹ Busch and Reinhardt (2003), p. 144.

under the GATT 1947 system was considerable. The GATT dispute settlement system worked for 47 years (1948 to 1994) and adopted 132 dispute settlement reports.¹² While in the International Court of Justice (ICJ), from 22 May 1947 to 15 June 2016 (69 years), 164 cases were entered in the ICJ and 26 advisory opinions have been issued¹³ and since 1996 there are 25 cases that have been submitted to the International Tribunal for the Law of the Sea (ITLOS).¹⁴

Despite all its achievements and praise, the GATT dispute settlement system was still criticized on the following issues:

- Non-automatic adoption of the panel reports in the GATT Council (Respondents could prevent the adoption of the report. This problem could have been resolved also by excluding the parties to the dispute in the process of adopting the panel report – in that case the adoption would not have been automatic but the problem of a losing party blocking the adoption of the report would have been overcome¹⁵);
- Lack of review of the panel reports;
- Lack of standard terms of reference;¹⁶
- Unreasonable delays: Delay in appointing a panel, in panel consideration of a case and the delays due to the failure of adopting the panel reports in the GATT Council;¹⁷
- The weak level of compliance with the panel reports by the losing party;¹⁸
- weak participation of developing and less developed countries;¹⁹

¹² See the World Trade Law website at:

<http://www.worldtradelaw.net/databases/gattpanels.php>, last visited on 1-10-2016.

¹³ It bears noting that the number mentioned refers to the cases entered into ICJ; among which some are decided. See the website of International Court of Justice at: <http://www.icj-cij.org/docket/index.php?pi=3>, last visited on 1-10-2016.

¹⁴ See the internet site of International Tribunal for the Law of the Sea at: <https://www.itlos.org/index.php?id=10&L=0>, last visited on 1-10-2016.

¹⁵ Davey (2014), p. 685.

¹⁶ D. Palmeter and P.C. Mavroidis, "The WTO Legal System: Sources of Law", *American Journal of International Law* (1998) 92, p. 408.

¹⁷ W.J. Davey, "Dispute Settlement in GATT", *Fordham International Law Journal* (1987) 11, pp. 83-84.

¹⁸ For further information on the remedies under GATT 1947, see G. Vidigal, "Re-Assessing WTO Remedies: The Prospective and the Retrospective", *Journal of International Economic Law* (2013) 16, pp. 512-14.

- lack of credibility if enforcing the sanctions by economically less strong winning parties as it may hurt their economy substantially.

It bears mentioning that under the GATT the possibility of retaliation (suspending concessions or other obligations) was only used once (in a dispute between the United States and the Netherlands) and there was therefore no experience with 'enforcing the sanctions'. This experience only came in the early 2000s under the WTO dispute settlement system.

During the Uruguay Round, the eighth round of negotiations in the framework of the GATT 1947, a dispute settlement system was designed on the basis of the experience and evolution of the GATT system. It can be asserted that the positive experience of GATT 1947 Members with the rules-based system motivated this further, which was a significant step in the transition from a power-based to a rules-based system and led to the establishment of the WTO dispute settlement system.²⁰

This new system is set out in the 'Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)', which is annexed to the Agreement Establishing the World Trade Organisation (hereinafter 'WTO Agreement') and is an integral part of this Agreement.²¹ Therefore, a Member joining the WTO automatically accedes to all WTO agreements including the DSU.

It is important to note that the DSU is a multilateral agreement. A multilateral agreement is an international agreement between three or more countries. In the WTO context, the term 'multilateral' agreement is used to refer to those agreements to which all WTO Members had to sign up – in contrast to the

¹⁹ Developing countries have only seldom made use of the GATT dispute settlement system, even though special rules existed that were designed to make it easier for them to do so. For a large part, this seems to have been a consequence of their belief that the system was, at best, designed to deal with disputes between the major developed countries. See: Davey (1987), pp. 89-90. For the participation problems of developing countries in the WTO DSU, see A.H. Qureshi, "Participation of Developing Countries in WTO Dispute Settlement", *Journal of African Law* (2003) 47, pp. 193-195.

²⁰ Busch and Reinhardt (2003), p. 176.

²¹ WTO Agreement Article II:2 states: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.'

plurilateral agreements to which WTO Members were free to sign up or not. Therefore, to join the WTO and its annexed agreements, including the DSU, an applicant – being either a country, or a separate customs territory²² – shall start the WTO accession process pursuant the rules which were introduced in chapter one.²³ In addition to multilateral agreements, the WTO law includes plurilateral agreements.²⁴

The WTO Agreement expressly enlists dispute settlement as one of the functions of the World Trade Organization and underlines its rules-based character.

Article III:3 of the WTO Agreement states:

The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.²⁵

The DSU came into force on 1 January 1995. As the DSU is an integral part of the WTO Agreement, the WTO Members have full access to its dispute settlement mechanisms. The DSU governs all disputes resulting from almost all WTO multilateral agreements²⁶ as well as the accession protocols.

²² Under Article XII:1 of the WTO Agreement, separate customs territories can also join the WTO. Article XII(1) states: 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.'

²³ See chapter one, section 1.2. General Information on Accession to the WTO.

²⁴ There are two plurilateral agreements: the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. For further information see WTO website at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm, last visited on 1-10-2016.

²⁵ WTO Agreement Article III:3.

²⁶ One of the plurilateral agreements, the Agreement on Trade in Civil Aircraft, is not a covered agreement. However, the other plurilateral agreement, the Agreement on Government Procurement is a covered agreement.

2.3. Nature of the WTO Dispute Settlement System (DSS)

After introducing the historical background of the WTO, it is important to shortly discuss the nature of the DSS to analyze whether the WTO dispute settlement system has a compulsory jurisdiction over disputes concerning the rights and obligations under the WTO agreements. This is analyzed here because a compulsory jurisdiction of dispute settlement system could be in conflict with Iran's constitutional rules and could result in an impediment to its accession to the WTO.²⁷

The nature of the DSS jurisdiction has three characteristics which are: 'compulsory', 'exclusive' and 'contentious'. Each element is treated in turn.

- Compulsory Jurisdiction

The DSS jurisdiction is compulsory, which means that the parties to a dispute do not need to agree on the jurisdiction of the DSS. Therefore, if a WTO Member brings a complaint in relation to the WTO covered agreements before the DSS, the respondent must agree to enter into consultations. If it refuses to do so (which happens very seldom), then the complainant can immediately request the establishment of a panel – which the respondent will not be able to block. If the respondent does accept to enter into consultations, the complainant can request the establishment of a panel only after 60 days. Therefore, the responding party shall participate in the dispute settlement process. By acceding to the WTO, a country clearly accepts the obligation (not the right) of compulsory participation in the disputes under the covered agreements. As a result, every Member enjoys ensured access to the dispute settlement system and no responding Member can escape its jurisdiction.²⁸

- Exclusive Jurisdiction

The DSS jurisdiction is exclusive because the WTO Members shall take their disputes in relation to the WTO agreements only before the DSS. Therefore, if a dispute regarding the WTO agreements is raised between the WTO

²⁷ This is further analyzed below in section 2.5. (How to Observe the Principle 139 in Accessing to the WTO).

²⁸ D. French, M. Saul, and N.D. White, *International Law and Dispute Settlement: New Problems and Techniques* (Bloomsbury Publishing, 2010), p. 179.

Members, it cannot be resolved in any other dispute settlement system but the DSS. This exclusive nature of the DSS jurisdiction is stated in the Article 23.1 of the DSU which reads:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.²⁹

The exclusive nature of the DSS thus not only excludes access to other dispute settlement systems but it also precludes unilateral actions of Members in dealing with their disputes with other WTO Members. This avoids power-based actions of Members and helps in resolving disputes through a multilateral rules-based system composed of the mechanisms embodied in the DSU.

The exclusive jurisdiction can be controversial when a dispute over the WTO agreements also falls under the jurisdiction of another dispute settlement system. For instance, Article 2.2 of the TRIPS Agreement provides that:

Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.³⁰

If a dispute arises in relation to the above-mentioned intellectual property conventions between the WTO Members, when exercising this jurisdiction, panels and the Appellate Body may need to take into account judgments by the ICJ regarding the IP agreements referred to (have there been such ICJ judgments). This issue merits a detailed discussion, but is beyond the limited scope of this dissertation. Another important note to be mentioned here with regard to the exclusive jurisdiction of the WTO dispute settlement system is that, under this system, parties may decide to opt for arbitration under Article 25 DSU.

²⁹ Article 23.1 of the WTO DSU.

³⁰ WTO TRIPS Agreement Article 2.2.

- Contentious Jurisdiction

That the DSS jurisdiction is 'contentious' implies that the DSS cannot issue advisory opinions. Although the panels and Appellate Body can clarify the WTO law through their interpretations during the disputes, an advisory opinion or interpretation cannot be issued by the DSS bodies if they are not based on an actual dispute. It bears mentioning that, according to the practice of the WTO panels and the Appellate Body, clarifications and interpretations are usually issued when the panel or Appellate Body believes it is useful for settlement of that relevant dispute. In other words, a request made by the disputing parties for a clarification and interpretation can be rejected if it is not helpful for the resolution of their dispute.³¹ This approach is different from the advisory opinion process in other dispute settlement systems such as, for example, the International Court of Justice.

In examining the nature of the DSS and its mechanisms, there are some subjects which will be discussed briefly below:

- The DSS Key Features (section 2.3.1) (What makes the DSS and its accession for Iran different from other multilateral agreements)
- Measures under Scope of the DSS (section 2.3.2) (What kind of act or omission can be brought before the DSS?)
- Access to the DSS (section 2.3.3) (Can private sectors have a direct access to the DSS?)
- The DSS Institutions and Mechanisms (section 2.3.4) (whether the WTO dispute settlement system is judicial or quasi-judicial)
- The WTO Dispute Settlement Process (section 2.3.5) (How does the DSS apply its compulsory jurisdiction)
- Recognition and Enforcement Under WTO DSS and International Commercial Arbitration (section 2.3.6)

³¹ In EC – Commercial Vessels (2005), the Panel declined to address a matter before it because it did not consider that 'an abstract ruling on hypothetical future measures' was either necessary or helpful to the resolution of that dispute. See Panel Report, EC – Commercial Vessels (2005), para. 7.30.

- Quasi-judicial (section 2.3.7) (Is the nature of the DSS mechanisms judicial or arbitration?)

2.3.1. The DSS Key Features

There are some key features which differentiate the DSS from other international dispute settlement systems that are reviewed in this section. As will be explained in section 2.5 (2.5. How to Observe the Principle 139 in Acceding to the WTO), Iran has addressed some international agreements under specific principles of its Constitution (Principle 139), while others could be resolved independently of this provision. It is therefore relevant to examine the key features that distinguish the WTO dispute settlement system from other international dispute settlement systems. These key distinguishing features are:

1. Providing several dispute settlement methods (consultations or negotiations, adjudication, arbitration, good offices, conciliation, and mediation): The WTO dispute settlement system is an exceptional system which includes almost all advanced and traditional/political (diplomatic) and legal methods of dispute settlement. Unlike other systems, the WTO Members can enjoy a mix of arbitration and adjudication methods during the proceedings of a dispute, which is unique and distinguishes it from other dispute settlement systems.
2. Under Article 23 of the DSU WTO Members should settle their disputes through the multilateral procedures of the DSS rather than through unilateral action: Article 23.2 of the DSU states that WTO Members should not have unilateral determination with regard to whether the WTO law is violated through, for instance, a measure of a WTO Member. They also cannot retaliate (suspend concessions or other obligations under the WTO rules) without following the process provided for in the DSS. Therefore, this system has banned unilateral actions, which is especially relevant with regard to actions by the major trade countries against other WTO Members.

3. The DSU expressly states a preference for resolving disputes through consultations (and reaching a mutually agreed solution³²) rather than through adjudication: Even though all WTO Members should start to resolve their disputes under the DSS through consultations, a mutually agreed solution prevails over other DSS mechanisms. Therefore, parties to a dispute can reach a mutually agreed solution at any time during the proceedings. However, the agreed solution cannot be inconsistent with the WTO agreements and should be notified to the Dispute Settlement Body.

4. The WTO dispute settlement system is explicitly mandated with the task to clarify the provisions of the WTO agreements: During the dispute resolutions (Article 3.2 of the DSU) the panel and Appellate Body can clarify WTO law in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties, in particular Articles 31 and 32 thereof. However, under Article 3.2, last sentence, and Article 19.2 of the DSU, the interpretations by panels and the Appellate Body shall not add to or diminish the rights and obligations of the WTO Members. The DSU thus includes an express prohibition on judicial activism.

5. Provides three types of remedies for breach of WTO law: the final remedy is the withdrawal or modification of the measure which is inconsistent with the WTO agreements. However, until the final remedy is achieved, there are two temporary remedies which can be applied against the losing party which are: compensation and retaliation (suspension of concessions or other obligations). If a losing party has not withdrawn or modified its WTO inconsistent measure by the end of a reasonable period of time, the winning party can have recourse to mutually agreed compensation until the measure is removed or modified to be consistent with the WTO agreements. If no agreement on compensation can be reached (which is often the case), retaliation is a measure of last resort to induce the losing party to withdraw or modify its WTO-inconsistent measure. Retaliation is the suspension of concessions or other obligations of the winning party. Retaliation must be authorized by the DSB, but the latter does so by a reverse consensus decision, i.e. quasi-automatically. The retaliation first should be sought in the same

³² W. Alschner, "Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System", 2 May 2013, available at <https://ssrn.com/abstract=2162466>, p. 7.

sector in relation to which the violation has been found. But, if it is not practical or effective, it can also be applied with regard to other obligations in other sectors or even in other WTO agreements.³³

To conclude, these WTO DSS features are not present in other international dispute settlement systems.³⁴ After discussing the main differences between the DSS and other international dispute settlement systems, it will be discussed what kind of act and omission can be brought before the DSS.

2.3.2. Measures within the Scope of the DSS

In later chapters it is examined if legal impediments related to Iran's Constitution may impede the country's accession to the WTO. One such impediment relates to the types of disputes that can arise. It is therefore important to examine what kind of disputes can be subject to the DSS. In this section first those measures which fall within the scope of the DSS (1) are discussed. Subsequently the complaints that can be subject to the DSS (2) are briefly introduced below.

(1) Measures falling within the scope of the DSS

As was mentioned above, disputes arising in almost all WTO multilateral agreements are exclusively resolved in the DSS. To refer a dispute to the DSS, an act or an omission should be attributable to a WTO Member. The DSU provisions apply the term 'measure(s)' to refer to such acts or omissions. The DSU, however, does not provide a specific definition of this term. The typical measure challenged in WTO dispute settlement is a legislation/regulation adopted by central government bodies as and when it is applied.³⁵ There are also seven 'atypical measures' that can fall within the scope of the DSS:

³³ Article 22.3 of the WTO DSU.

³⁴ To see some the difference between the WTO DSS and other international dispute settlement systems for instance see M. Bronckers and F. Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement", *Journal of International Economic Law* (2013) 16, pp. 3-7.

³⁵ T. S. L. Voon, and A. Yanovich, "The Facts Aside: The Limitation of WTO Appeals to Issues of Law", *Journal of World Trade* (2006) 40, p. 251, available at: <https://ssrn.com/abstract=034960>, last visited on 1-10-2016.

- Action or conduct by private parties attributable to a Member:

Only national governments and separate customs territories are directly subject to the WTO obligations. Consequently, the term 'measure' in the DSU refers only to policies or actions of the government and not those of private parties.³⁶ However, if there is a certain level of government involvement³⁷ in the private action or endorsement from the government,³⁸ this private action can also be challenged in the WTO dispute settlement system.

- Measures that are no longer in force:

Measures that expired during the course of a proceeding can be the subject to the WTO dispute settlement system. However, that measure should be affecting the operation of the WTO agreements.³⁹ Therefore, it is not a matter of whether the measure is still in force or not, but whether the benefits of a WTO Member are impaired due to that measure.

- Legislation 'as such':

According to case law developed under the GATT 1947⁴⁰ and adhered to under the WTO,⁴¹ national legislation 'as such' (as opposed to the actual application of the legislation in specific cases) can be subject to the DSS if it is inconsistent with the WTO agreements. The actual application of the legislation is thus not decisive.⁴²

³⁶ Panel Report on Japan – Measures Affecting Consumer Photographic Film and Paper (1998), para. 10.52.

³⁷ Ibid, para. 1056.

³⁸ Ibid, para. 1052.

³⁹ Appellate Body Report, US-Upland Cotton (2005), para. 262.

⁴⁰ The GATT Panel reports in US-Superfund (1987); US-Section 337 (1989); Thailand-Cigarettes (1990); and US-Malt Beverages (1992).

⁴¹ Panel reports in Japan-Alcoholic beverages II (1996); Canada-Periodicals (1997); EC-Hormones (1998); Korea-Alcoholic Beverages (1999); Chile-Alcoholic Beverages (2000); US-FSC (2000) and US-Section 110(5) Copyright Act (2000).

⁴² For further information see Van den Bossche and Zdouc (2013), p. 165.

- Discretionary legislation (as opposed to mandatory legislation):

A law reserving the right for unilateral measures to be taken contrary to the WTO agreements can also be subject to the DSS. This law can offer domestic authorities some leeway regarding what action (WTO-consistent or WTO-inconsistent) to take, whereas mandatory legislation does not leave such leeway.⁴³ In *US – 1916 Act* (2000) the Appellate Body noted that, in the examination of claims on legislation ‘as such’, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.⁴⁴ This distinction, however, does not relate to whether legislation ‘as such’ can be challenged in the WTO dispute settlement system. In other words, regardless of whether it is mandatory or discretionary, legislation ‘as such’ can be challenged.⁴⁵ On the basis of panel’s findings in *US – Section 301 Trade Act* (2000), the Appellate Body observed that ‘the import of the mandatory/discretionary distinction’ may vary from case to case.⁴⁶ According to the Panel in *US – Section 301 Trade Act* (2000), the duty of WTO Members under Article 23 of the DSU is to guarantee other Members, as well as the marketplace and those who operate in it, that no unilateral determinations of inconsistency with WTO law will be made.⁴⁷ The panel stated that when a Member imposes unilateral measures in violation of Article 23 in a specific dispute, serious damage is caused both to other Members and the marketplace. However, in our view, the damage is not confined to actual conduct in specific cases. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may – as is the case here – constitute an ongoing threat and produce a ‘chilling effect’ causing serious damage in a variety of ways.⁴⁸ The Panel in this case (*US – Section 301 Trade Act* (2000)) concluded that the statutory language of Section 304 of the Trade

⁴³ Van den Bossche and Zdouc (2013), p. 166.

⁴⁴ Appellate Body Report, *US-1916 Act* (2000), para. 60.

⁴⁵ See Appellate Body Report, *US-Correction-Resistant Steel Sunset Review* (2004), para. 88.

⁴⁶ *Ibid*, para. 93.

⁴⁷ See Panel Report, *US-Section 301 Trade Act* (2000), para. 7.95.

⁴⁸ *Ibid*, para. 7.88.

Act of 1974, even though it was not mandatory but discretionary in nature, was *prima facie* inconsistent with Article 23 of the DSU.⁴⁹

- Unwritten 'norms or rules' or practices of WTO Members:

To challenge an unwritten rule or norm, the complainant should clearly establish whether that rule or norm is attributable to the responding country. Also, the precise content of the rule or norm should be clarified. Then, it should be determined whether that rule or norm has general and prospective application. If sufficient evidence regarding each of these three elements is produced, then that unwritten rule or term can be challenged in the DSS.⁵⁰

- Ongoing conduct by Members:

According to the WTO Appellate Body ruling in *EC and Certain Member States – Large Civil Aircraft* (2011), it is not necessary for the complaining party to demonstrate the existence of a rule or norm of general and prospective application to show that such concerted action or practice exists and can be challenged in the DSS.⁵¹ But can any ongoing conduct be challenged in WTO dispute settlement? What must be demonstrated has been stated in the Appellate Body Report in *US – Continued Zeroing* (2009),⁵² even though a clear answer to this question cannot be found in WTO law.

- Measures by regional and local authorities:

Measures of the central government subject to the DSS include legislative, executive and judicial⁵³ acts. A question can be raised in the case of federal governments whether the measures taken by those sub-federal levels of government, over which the federal government has little control, can be

⁴⁹ Ibid, para. 7.97. For further information see Van den Bossche and Zdouc (2013), pp. 166-168.

⁵⁰ Appellate Body Report, *US-Zeroing (EC)* (2006), para. 198.

⁵¹ Appellate Body Report, *EC and Certain Member States-Large Civil Aircraft* (2011), para. 794.

⁵² Appellate Body Report, *US-Continued Existence and Application of Zeroing Methodology* (2009), para. 185.

⁵³ Appellate Body report, *US-Shrimp* (1998), para. 173.

subject to the DSS. As it can be inferred from Article 22.9,⁵⁴ even if under its Constitution the central government cannot control the regional or local authorities, measures taken by sub-federal levels of government can be subject to the DSS.⁵⁵

(2) Types of complaints subject to the DSS

After the measures under the scope of the DSS were introduced, the complaints which can be subject to the WTO dispute settlement system are discussed below.

Almost all WTO multilateral agreements refer to Articles XXIII and XXII of the GATT Agreement. In order to have a better understanding of the kind of complaints that can be brought before the WTO dispute settlement system, we need to scrutinize Article XXIII:1 of GATT 1994 which states:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation...⁵⁶

Under Article XXIII:1, three kinds of complaints on nullification or impairment of benefits accruing to a WTO Member that can be taken into the DSS are:

- Violation complaints;

⁵⁴ Article 22.9 of the DSU states: 'The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.'

⁵⁵ Van den Bossche and Zdouc (2013), p. 171.

⁵⁶ GATT 1994 Article XXIII:1.

- Non-violation complaints; and
- Situation complaints.

For a violation complaint, under Article 3.8 of the DSU, there is a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and, in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.⁵⁷ It is thus not necessary for the complainant to show the nullification or impairment of its benefits; proof of a violation of the WTO agreements is sufficient. However, in the case of a non-violation or situation complaint, the existence of a breach of a WTO provision is irrelevant. What matters is the question whether the measure or the situation has resulted in the nullification or impairment of benefits.⁵⁸

2.3.3. Access to the DSS

After discussing the scope of the DSS, it is important to examine who has access to the DSS. The WTO is an international organization that is described as being 'member driven'. This is indicative of Members being the sole actors within it. This section examines the status of private sectors (domestic non-governmental organizations and companies) as applicants under the DSU. Access to the DSS is relevant because WTO Members may act as gate-keepers to private disputes and therefore may affect the type of disputes that arise under the WTO.

The DSS is limited to WTO Members, which includes countries and separate customs territories. Therefore, individuals or international organizations, including governmental and nongovernmental organizations, do not have direct access to the WTO.⁵⁹ Consequently, the DSS can only be accessed by countries and separate custom territories (which are WTO Members). However, although the private sector, such as companies, industrial associations and NGOs, do not have direct access to the DSS, they can play an important role in WTO disputes. In addition to their lobbying at the national

⁵⁷ Article 3.8 of the DSU.

⁵⁸ For further information see: R.W. Staiger and A.O. Sykes, "Non-Violations", *Journal of International Economic Law* (2013) 16, p. 748.

⁵⁹ Appellate Body Report, US-Shrimp (1998), para. 101.

level for a dispute to be taken to the DSS, private parties often have an important role in planning the legal strategy and drafting the submissions.⁶⁰ Moreover, in some countries, the legal system provides facilities designed for the private sector to induce the government to take disputes to the WTO dispute settlement system. Examples of such legislation include the Trade Barrier Regulation⁶¹ in the EU, Section 301 of 1974 Trade Act⁶² in the US and the Investigation Rules of Foreign Trade Barriers in China.⁶³ The non-governmental institutions and private sector can also contribute to the panel and Appellate Body proceedings through *amicus curiae* ('friend of the court') briefs.⁶⁴

After a short introduction to the key features, jurisdiction and the scope of the WTO dispute settlement system, it would be helpful to become familiar with the institutions and dispute settlement mechanisms that assist the DSB in resolving a dispute.

2.3.4. The DSS Institutions and Mechanisms

There are several dispute settlement institutions (A) and mechanisms (B) which can be involved in resolving disputes under the WTO dispute settlement system. These are introduced briefly below:

A) WTO DSS Institutions

There are three institutions in the WTO dispute settlement system: Dispute Settlement Body, panels and the Appellate Body. Each one is briefly introduced below.

⁶⁰ See Van den Bossche and Zdouc (2013), p. 178.

⁶¹ European Council Regulation no. 3286/94 on community procedures for the exercise of rights under international trade rules, in particular those established under the WTO, OJ 1994, L349,71, as amended by Council regulation (EC) no. 356/95, OJ 1995, L41,3.

⁶² Section 301 (a)(1) of the Trade Act 1974, 19 USC 2411 (a)(1).

⁶³ Investigation Rules of Foreign Trade Barriers, entered into force on 1 March 2005. See: X Zhang *International Trade Regulation in China: Law and Policy*, China and International Economic Law Series (Hart Publishing, 2006), p. 174.

⁶⁴ According to the Appellate Body case law, panels and the Appellate Body can accept and consider written briefs which are submitted by individuals, companies or organizations. For further information see the relevant section in: Van den Bossche and Zdouc (2013), pp. 263-267.

1. Dispute Settlement Body

The Dispute Settlement Body (DSB) is an institution which plays important role from the start to the end of the resolution of a dispute in the DSS. The DSB is composed of representatives of all the WTO Members. In fact, when the WTO General Council administrates the dispute settlement system, it convenes as the DSB.⁶⁵ Article 2.1 of the DSU states:

Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.⁶⁶

The role of the DSB in the WTO dispute settlement system is far more than the functions stated in Article 2.1. The DSB is responsible for administering the DSU and for overseeing the entire dispute settlement process.⁶⁷ Also it is responsible for:

- the referral of a dispute to adjudication (establishing a panel);⁶⁸
- making the adjudicative decision binding (adoption of reports);⁶⁹
- supervising the implementation of the ruling;⁷⁰
- authorizing 'retaliation' when a Member does not comply with the ruling.⁷¹

Most of the decisions of the DSB are taken by negative consensus, which means that in the relevant cases the DSB decides unless there is a consensus among the WTO Members not to take that decision. The DSB convenes its meetings as often as necessary to perform its functions within the timeframe stated in the DSU.⁷²

⁶⁵ Van den Bossche and Zdouc (2013), p. 206.

⁶⁶ Article 2.1 of the DSU.

⁶⁷ WTO *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication*, World Trade Organization Dispute Settlement Reports (Cambridge University Press, 2004), p. 17.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid, p. 18.

⁷¹ Ibid.

⁷² Van den Bossche and Zdouc (2013), p. 207.

2. Panels

When a dispute cannot be resolved through consultations, the establishment of a panel can be requested by the complainant from the DSB. The panel is an *ad hoc* dispute settlement institution to resolve the disputes under the DSU rules. A panel is normally composed of three persons. However, the dispute parties can agree on five panellists.⁷³

Article 8.1 of the DSU provides that the panellists must be well qualified governmental or non-governmental individuals. The panellists are selected from those who have served on or presented a case to a panel in the GATT 1947 or other covered agreements disputes settlement systems, councils, committees or Secretariat. And from among those who have taught or published on international trade law or policy or served as a senior trade policy advisor of a Member.⁷⁴ Panellists can serve more than once on a panel.⁷⁵ The WTO Secretariat proposes the nominations to the parties of a dispute to be agreed upon. The parties may reject the nominations. If the parties cannot agree on panellists within 20 days of the establishment of the panel by the DSB, either party can request the Director General of the WTO to appoint the panellists. WTO Members usually suggest names to the DSB to be approved and included in the indicative list of panellists. However, those who are not on the list can also be appointed as panellists.⁷⁶ The results of the panel proceedings are adopted by the DSB.

3. Appellate Body

As was mentioned earlier, panels are *ad hoc* institutions. However, the Appellate Body is the standing body of the WTO dispute settlement system. The Appellate Body was established to review the panel reports. This possibility (facility) was not available in the GATT 1947 and most international dispute settlement systems lack such a review system. The Appellate Body is composed of seven Members. Article 17.3 of the DSU states the qualifications of Appellate Body Members as:

⁷³ The parties can agree within 10 days from the establishment of the panel to have five panellists.

⁷⁴ DSU Article 8.1.

⁷⁵ Van den Bossche and Zdouc (2013), p. 215.

⁷⁶ *Ibid*, p. 228.

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO.⁷⁷

The Appellate Body Members are appointed by the Dispute Settlement Body (DSB) for four years which can be renewed once.⁷⁸ The DSB adopts its decisions on this issue by consensus. The Members of the Appellate Body are appointed on the recommendation of a Selection Committee. This Committee is composed of the Chairs of: the General Council, the DSB, the Council for Trade in Goods, the Council for Trade in services, the TRIPS Council, and the WTO Director General. The recommendation of the Selection Committee is made based on a selection from among the nominated candidates from WTO Members.⁷⁹

According to Article 17.1 of the DSU, the Appellate Body hears and decides the disputes in divisions of three Members who are selected on the basis of rotation and at random.⁸⁰ The nationality of the Members of the division is not taken into consideration and they can have the same nationality as the dispute parties. The presiding Member is selected by the division Members.⁸¹ Before the division makes its decision on an appeal, there is an exchange of views among all seven Members of the Appellate Body on the key issues raised in the appeal, which contributes to the quality and consistency of the case law of the Appellate Body.⁸² The decisions of the division are made based on consensus and, if consensus cannot be achieved, by majority vote.⁸³ The division Members can also express their individual, separate opinion in the

⁷⁷ DSU Article 17.3.

⁷⁸ DSU Article 17.2.

⁷⁹ For further information see Van den Bossche and Zdouc (2013), p. 232.

⁸⁰ The randomness of the composition of divisions is stipulated in the Working Procedures for Appellate Review.

⁸¹ Van den Bossche and Zdouc (2013), p. 233.

⁸² See *ibid*, p. 234.

⁸³ Rule 3(2) of the Working Procedures for Appellate Review.

report but such opinions must remain anonymous.⁸⁴ The Appellate Body elects a Chairperson every year and has its own Secretariat.

B) WTO Dispute Settlement Mechanisms

After a short discussion of WTO dispute settlement organs/institutions, an introduction to the dispute settlement mechanisms provided for in the WTO DSS is presented below.

1. WTO Arbitrations

There are three types of arbitration in the WTO dispute settlement system, which are arbitration under Article 21.3, arbitration under Article 22.6, and arbitration under Article 25 of the DSU.

Arbitration under Article 21.3: When the rulings and recommendations of panels and/or the Appellate Body regarding a dispute are adopted by the DSB, prompt implementation is expected. However, if it is impracticable for the Member concerned to implement the ruling immediately, the parties can agree upon a reasonable period of time for implementation. If they cannot agree upon the reasonable period of time, it can be referred to arbitration to be determined. The arbitrator should issue his/her binding award in 90 days.⁸⁵ The arbitrator should be appointed by the parties and if they cannot agree on arbitrator within 10 days, the arbitrator will be appointed, again within 10 days, by the WTO Director General.

Arbitration under Article 22.6: When the implementation is not achieved during a reasonable period of time, the complainant can request authorization from the DSB for the suspension of concessions or other obligations (retaliation) against the responding party. The responding party can object to the level of suspension or claims that the required principles and procedures have not been followed. These issues can be referred to arbitration to be determined.⁸⁶ This arbitration should be carried out by the original panel if the members of that panel are available. Otherwise, one or more of the

⁸⁴ Article 17.11 of the DSU.

⁸⁵ Article 21.3(c) of the DSU.

⁸⁶ For further information see: J. Tijmes, "Jurisprudential Developments on the Purpose of WTO Suspension of Obligations", *World Trade Review* (2014) 13, p. 2.

arbitrators will be appointed by the WTO Director General. Within 60 days from the expiry of the reasonable period of time, the award should be issued.

Arbitration under Article 25: To resolve a dispute, parties can agree to refer it to arbitration 'as an alternative means of dispute settlement'.⁸⁷ The procedures to be followed in arbitration should also be agreed by the parties.⁸⁸ Referral of a dispute to arbitration should be notified to the DSB.⁸⁹ Unlike other arbitrations (Article 21.3 and 22.6), arbitration under Article 25 is: 1) a mutually agreed solution; and 2) a separate and different dispute settlement mechanism. It bears considering that recourse to arbitration under Article 25 of the DSU is subject to the agreement of both parties and in this respect it differs from arbitration under Articles 21.3 (c) and 22.6 of the DSU. In addition, arbitrations under Articles 21.3(c) and 22.6 of the DSU take place in the context of the standard dispute settlement proceedings (they concern specific issues which arise in the context of these proceedings), while Article 25 DSU provides for an alternative to these proceedings.

It is also addressed as an alternative to some DSS mechanisms such as the panel process, to which Members may have recourse whenever necessary within the WTO framework.⁹⁰ In US – Certain EC Products the Panel states:

Although the panel (and Appellate Body) process is the most commonly used WTO dispute settlement procedure, Article 25 of the DSU, for example, explicitly provides for arbitration as a means of adjudicating WTO related disputes. Article 25.4 provides for the applicability of Articles 21 and 22 of the DSU to the results of such arbitration. There is no reason why the WTO assessment of the compatibility of an implementing measure could not be determined by an Article 25 arbitration, as one of the WTO dispute settlement procedures.⁹¹

Therefore, referral to arbitration under Article 25 of the DSU and its award can be mutually agreed by WTO Members in their disputes under the WTO

⁸⁷ Article 25.1 of the DSU.

⁸⁸ Article 25.2 of the DSU.

⁸⁹ Article 25(2) and (3) of the DSU.

⁹⁰ Award of Arbitrators, US-Section 110(5) Copyright Act (Article 25), para. 2.3.

⁹¹ Panel Report, US-Certain EC products, para. 6.119.

covered agreements as an independent, separate and alternative dispute settlement mechanism of the DSS.

2. Consultations and mutually agreed solutions

Settlement of WTO Members disputes should start with consultations. The consultations can result in a mutually agreed solution.⁹² If not, or if the responding party fails to agree to the consultations within 10 days of the request or fails to enter into the consultations within 30 days, the complainant can request the DSB for establishment of a panel. Under Article 3.7 of the DSU, 'a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'. Consultations are thus preferred over other dispute settlement mechanisms. However, a mutually agreed solution reached through consultations should be consistent with the WTO agreements.⁹³ 'To reach a mutually acceptable solution, Members can engage in consultations or resort to mediation and good offices'.⁹⁴

3. Good Offices, Conciliation and Mediation

Good offices, conciliation and mediation are voluntarily procedures⁹⁵ which may be requested by any party to a dispute at any time and be terminated at any time.⁹⁶ If the good offices, conciliation and mediation cannot resolve the dispute within 60 days after the date of the request for the consultations, the complainant can request the establishment of a panel.⁹⁷ However, pursuant to Article 5.4 of the DSU, procedures for good offices, conciliation or mediation can continue while the panel process proceeds.⁹⁸ In July 2001 the WTO Director General addressed a communication to the Members in which he

⁹² For further information on the notion of mutually agreed solutions under the Dispute Settlement Understanding see: A. Alvarez-Jiménez, "Mutually Agreed Solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration", *World Trade Review* (2011) 10, p. 347.

⁹³ Alschner (2013), p. 8.

⁹⁴ Appellate Body Reports, US/Canada-Continued Suspension, para. 340

⁹⁵ Article 5.1 of the DSU.

⁹⁶ Article 5.3 of the DSU.

⁹⁷ Article 5.4 of the DSU.

⁹⁸ Article 5.5 of the DSU.

reminded Members of his availability to help settle disputes through good offices, mediation or conciliation.⁹⁹

After discussing the WTO institutions and dispute settlement mechanisms, it is briefly introduced how a dispute would be treated and resolved under the DSS and how the compulsory jurisdiction of the DSS works.

2.3.5. The WTO Dispute Settlement Process

Principle 139 of Iran's Constitution includes requirements on dispute settlement which can result in a legal impediment to Iran's accession to the WTO. Some dispute settlement mechanisms can be beyond the Principle 139 requirements. To find out what mechanisms are provided by the DSS and also whether the disputing parties are obliged to use those DSS mechanisms which are within the scope of Iran's constitutional requirements, the WTO dispute settlement process is introduced briefly below. It bears mentioning that if the DSS mechanisms which are within the scope of Iran's Principle 139 are not compulsory for the WTO Members, it can be asserted that there would not be any conflict between the DSU and Iran's Constitution and, therefore, there would be not any legal impediment to Iran's accession to the WTO.

The process of dispute settlement under DSS can have four phases: consultations, panel proceedings, Appellate Body proceedings, and implementation and enforcement. This process has some important features which make it more attractive/efficient than other international dispute settlement processes which are: the short timeframe for dispute settlement through its mechanisms; the confidentiality of the process; the burden of proof (which is on the responding party in *prima facie* cases¹⁰⁰); the role of

⁹⁹ See Communication from the Director-General, Article 5 of the Dispute Settlement Understanding, WT/DSB/25, dated 17 July 2001.

¹⁰⁰ When a *prima facie* case has been made (i.e. sufficient evidence has been adduced to raise a presumption that what is claimed is true), the burden shifts to the opposing party to rebut this evidence. When a respondent raises an exception as an affirmative defence, it bears the burden of proof with regard to that exception. See Van den Bossche and Prévost (2016), p. 293.

private legal counsel in representing the dispute parties;¹⁰¹ the *amicus curiae* briefs by non-governmental organizations;¹⁰² and the Members are committed to act in good faith¹⁰³ in the proceedings.

When a dispute is brought to the WTO dispute settlement system, it usually follows the above-mentioned phases which are introduced as follows:

- Consultations

Treating a dispute in the WTO dispute settlement system should start with consultations. This mechanism, which can result in a mutually agreed solution (that can be achieved anytime during dispute settlement process),¹⁰⁴ and three methods of 'good offices, conciliation and mediation' are the political (diplomatic) ways of dispute settlement in the DSS. Other mechanisms, which are panel and Appellate Body proceedings (adjudicative mechanisms¹⁰⁵) and arbitration, are legal mechanisms. As mentioned earlier,

¹⁰¹ WTO Members have discretion to determine the composition of their own delegations in WTO dispute settlement proceedings. They thus may, and frequently do, make use of private legal counsel to represent them in these proceedings. See Van den Bossche and Prévost (2016), p. 269.

¹⁰² So far, an increasing number of 'outsiders' or *amici curiae*, such as NGOs, but also industry and academics, have pressed their (expert) opinion on WTO panels and the Appellate Body. For further information see J. Pauwelyn, "The Use of Experts in WTO Dispute Settlement", *The International and Comparative Law Quarterly* (2002) 51, pp. 325-364, and also see the list of proceedings in which *amicus curiae* submissions were received at: WTO Analytical Index of Article 2 of the DSU at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_o6_e.htm#article13, last visited on 1-10-2016.

¹⁰³ Article 3.10 of the DSU states: 'It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.' Engaging in dispute settlement in good faith, i.e. with the genuine intention to see the dispute resolved is the part of the object and purpose of the WTO dispute settlement system. See: Van den Bossche and Zdouc (2013), p. 267.

¹⁰⁴ See Article 11 of the DSU.

¹⁰⁵ A. Yanovich and T. Voon, "Completing the Analysis in WTO Appeals: The Practice and its Limitations", *Journal of International Economic Law* (2006) 9, p. 935.

negotiations in the form of consultations is preferred over other mechanisms in the DSS.¹⁰⁶

Under the DSS, a request for consultations should be made in writing and should be also notified to the Dispute Settlement Body (DSB).¹⁰⁷ The request should also include the identification of the measures at issue and the legal basis for the complaint.¹⁰⁸ It bears considering that the scope of the consultations and also the panel and Appellate Body discussions are limited to the request of consultations.¹⁰⁹ When a request is made for consultations, the responding Member must reply to the request within 10 days.¹¹⁰ The responding party should also enter into consultations within 30 days¹¹¹ after the request. If there is no response to the request on the consultations, or the response does not start in due time, the complainant can request the establishment of a panel. Although, under DSS, the consultation is confidential,¹¹² the information discussed there can be used in other dispute settlement mechanisms – such as panel and Appellate Body proceedings – in the same dispute. It bears mentioning that the consultations are ‘without prejudice to the rights of any Member in further proceedings’ (Article 4.6 of the DSU).

The request for the consultations can be made on the basis of GATT Article XXII (or corresponding provisions) or on the basis of GATT Article XXIII (or corresponding provisions).¹¹³ If the request is made under GATT Article XXII or corresponding provisions), another Member which considers having

¹⁰⁶ Article 3.7 of the DSU states: ‘A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.’

¹⁰⁷ Article 4.4 of the DSU states: ‘All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.’

¹⁰⁸ *Ibid.*

¹⁰⁹ See Appellate Body reports on *US-Certain EC Products* (2001) paras. 69-82 and *US-Upland Cotton* (2005), paras. 284-5 and 286-7.

¹¹⁰ See Article 4.3 of the DSU.

¹¹¹ This time can be changed through the mutual agreement of the parties of the dispute. See Article 4.3 of the DSU.

¹¹² Article 4.6 of the DSU.

¹¹³ See Article 4.11 of the DSU.

a 'substantial trade interest'¹¹⁴ can notify the consulting Members and the DSS of its interest within 10 days of the circulation of the main request. If the responding party agrees that this claim of substantial interest is well founded, the third Member can join the consultations.¹¹⁵ However, participation of other Members other than the responding party is not possible if the consultations are made on the basis of Article XXIII (or corresponding provisions). If the consultations are successful, the solution should be notified to the DSB and any Member can raise any point for the solution.¹¹⁶ However, in case of a failure to reach a solution within 60 days after the receipt of the request for consultations, the complaining party can request the establishment of a panel.

- Panel proceedings

If the consultations do not work and the dispute is not resolved, the complainant can request the DSB for the establishment of a panel. Unlike the GATT 1947 dispute settlement system, a request for a panel will be automatically approved by the DSB.¹¹⁷ Then, the parties agree on the panel composition. If they cannot agree on the composition of the panel, the WTO Director General decides on the composition.

When the panel is composed, it will fix the timetable for its work within one week. It bears mentioning that, as stated in Article 11 of the DSU, 'panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.'¹¹⁸ Therefore, although the disputing parties decide to start an adjudicative process, the diplomatic negotiations which have been started in the previous stage (consultations) do not necessarily stop. Pursuant to Article 12.12 of the DSU, the complaining party can also request the suspension of the panel work during its proceedings. This suspension may take up to 12 months. Thereafter it is for the complaining party to request that the panel resumes its

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ See Article 3.6 of the DSU.

¹¹⁷ In GATT 1947 dispute settlement system, the responding Member could block the panel's establishment. However, under the WTO DSS, the panel will be established, unless the DSB decides by consensus not to establish the panel.

¹¹⁸ Article 11 of the DSU.

work, otherwise, in case the suspension proceeds over 12 months, the panel loses its authority.¹¹⁹

Under Article 12.1 of the DSU, there are Working Procedures for the panel stated in Appendix 3 of the DSU. The panel can also decide on *ad hoc* Working Procedures and the parties only have to be consulted. The panel cannot modify the substantive procedures of the DSU.¹²⁰ As the Working Procedures embodied in Appendix 3 of the DSU are limited to basic rules, panels may find it useful to adopt more detailed *ad hoc* Working Procedures.¹²¹ It bears mentioning that in most cases panels now adopt *ad hoc* Working Procedures, as the Working Procedures set out in Appendix 3 are quite general. Also, while Article 12.1 of the DSU merely requires that panels consult the parties before adopting *ad hoc* Working Procedures, panels would in practice not adopt such Working Procedures without the consent of the parties.

Each party submits two written submissions: a first written submission and a rebuttal submission. The first submission includes the facts of the case and their arguments on the alleged inconsistencies with WTO law. The respondent party, through the rebuttal submission, replies to the arguments and evidence presented by the other party. After the filing of the first submissions, the panel holds a substantive meeting with the parties to the dispute. The second substantive meeting of the panel with parties will be held after the filing of the rebuttal submissions.

Under Article 15 of the DSU, after the report of the panel is drafted, it will be sent to the parties for their comments. Following the expiration of the set period of time for the receipt of comments from the parties to the dispute, the panel issues its interim report to the parties and the parties may make written comments to it. The parties can make comments on each other's written comments to the interim report and the panel may hold a further meeting if a

¹¹⁹ See for example in US-The Cuban Library and Democratic Solidarity Act (Helms-Burton Act) (complaint by the EC); and India-Wines and Spirits (complaint by the EC).

¹²⁰ See Appellate Body Report, Indian-Patents (US)(1998), para. 92.

¹²¹ As an instance of such *ad hoc* panel working procedures see Panel Reports, US-Steel safeguards (2003), para. 6.1.

party requests. The final report will include a summary and discussion of the arguments in the interim review stage. The interim review of the panel is regarded as being an unusual feature in judicial or quasi-judicial dispute settlement proceedings.¹²² The panel will, on the basis of the comments received from the parties during interim review, finalize its report. This final report is first sent to the parties to the dispute and then, after it is available in three WTO working languages, circulated to the WTO Members. 60 days after the date of circulation to the WTO Members, the report is adopted unless in the case of appeal by a party to the dispute or the DSB decides by consensus not to adopt it. If it is appealed, the DSB does not discuss the report until the Appellate Body proceedings are completed and then both the panel report and the Appellate Body report will be adopted together. When the report is adopted by the DSB, it must be treated by parties to the dispute as the final resolution to that dispute.¹²³

- Appellate Body proceedings

The Appellate Body proceedings start when a party notifies the DSB of its decision to appeal a panel report. The appeal will be heard by a division of three Appellate Body Members. This division has the responsibility of deciding the appeal.

The Appellate Body has detailed standard working procedures, the Working Procedures for Appellate Review. The Working Procedures were first adopted on 15 February 1996 and last revised on 16 August 2010.¹²⁴ A division hearing a particular appeal may adopt additional procedures, for instance, when a procedural question arises that is not covered by the Working Procedures. However, these procedures should be consistent with the DSU, other covered agreements and the Working Procedures.¹²⁵

Pursuant to Rule 20(2)(d) of the Working Procedures, a notice of appeal includes:

1. identification of the alleged errors made by the panel;

¹²² See Van den Bossche and Zdouc (2013), p. 282.

¹²³ See Appellate Body Report, EC-Bed Linen (Article 21.5-India) (2003), para. 95.

¹²⁴ WTO document, WT/AB/WP/6.

¹²⁵ Working Procedures for Appellate Review, Rule 16(1).

2. a list of the legal provision(s) of the covered agreement that the panel is alleged to have erred in interpreting or applying;¹²⁶ and
3. an indicative list of the paragraphs of the panel report containing the alleged errors.¹²⁷

If the notice of appeal fails to give the appellee sufficient notice of a claim of error, the claim cannot be considered by the Appellate Body.¹²⁸ The notice of appeal describes the terms of reference of the Appellate Body in a specific appeal.

Other parties to the dispute can file a cross appeal through a 'notice of other appeal' within five days of the notice of appeal.¹²⁹ The appellate review process can be withdrawn at any stage by the appellant in order to terminate the process or to submit a new appeal notice.¹³⁰ Submitting a new appeal notice is a highly controversial issue. Could an appellant at any stage of the appellate review proceedings withdraw its appeal and submit a new notice of appeal?¹³¹ This needs further discussion which is beyond the limited scope of this chapter.

Under Rule 23bis of the Working Procedures, a notice can also be amended, but such an amendment can only concern the specific amendments that the appellant or other appellant wishes to make to the Notice.¹³² Pursuant to Rule 21(1) of the Working Procedures, the appellant must file a written submission (stating the grounds of appeal) on the same day of filing the notice of appeal. This is the same for the other appeal. To respond to allegations of legal error

¹²⁶ For further information see: L. Bartels, "Jurisdiction and Applicable Law in the WTO," 24 September 2014, available at <https://ssrn.com/abstract=2801989>, p. 8.

¹²⁷ See Rule 20(2)(d) of the Working Procedures for Appellate Review.

¹²⁸ See Van den Bossche and Zdouc (2013), p. 285.

¹²⁹ See Rule 23 of the Working Procedures for Appellate Review.

¹³⁰ See Rule 30(1) of the Working Procedures for Appellate Review.

¹³¹ For instance, in *India-Autos* (2002) the Appellate Body issued subsequent to the withdrawal a brief report on the procedural history and the reason for not having completed its work namely, India's withdrawal of its appeal. Appellate Body Report, *India-Autos* (2002), paras 14-18. For further information, also see Appellate Body Report, *EC-Sardines* (2002), para. 141.

¹³² Upon a request of the appellant or other appellant the division may authorise the amendment of a notice, taking into account the 90-day timeframe for appellate review and the interests of fairness and orderly procedures.

(raised in submissions of the original or other appellants), a party must file an appellee's submission within 18 days of the appeal notice,¹³³ and for the third parties' submissions, the time limit is 21 days. If a participant does not file its submission within the required time, the Appellate Body division may, after hearing the views of the participants, issue such an order, including the dismissal of the appeal, as it deems appropriate.¹³⁴

Pursuant to Rule 27(1), an oral hearing may be held within 30 to 45 days after the appeal notice. During the oral hearing, the participants clarify the legal issues in an appeal through presenting and arguing their cases before the division which is responsible for deciding the appeal. During the appellate proceedings, the division can ask questions or request additional memoranda. The participants and other participants will be given an opportunity to respond to the received answers or memoranda.¹³⁵

Before finalising the report, the division responsible for deciding the appeal exchanges views with the other Appellate Body Members on issues raised in the appeal; and then, drafts the report. The report will be signed by the three Members of the division. After it is translated into three languages of the WTO,¹³⁶ the report will be circulated to the WTO Members as an unrestricted document. The Appellate Body report as well as the panel report will be adopted by the DSB within 30 days after circulation of the Appellate Body Report.

- Implementation and enforcement

To resolve a dispute, a complainant should start with consultations. If the consultations fail to resolve the dispute, the complainant can request the establishment of a panel. When the panel issues its report, it can be appealed by either of the parties and when the Appellate Body proceedings are completed, a report will be issued. When the report(s) is/are adopted by the DSB, another important part of the dispute settlement system starts, which is the implementation and enforcement of the report(s). If, on the basis of the

¹³³ See Rules 21(1) and 23(4) of the Working Procedures.

¹³⁴ See Rule 29 of the Working Procedures.

¹³⁵ Rule 28 (1) and (2), Working Procedures.

¹³⁶ English, French and Spanish.

result, a WTO Member's measure(s) is inconsistent with its obligations under WTO agreements, then within 30 days of the adoption of the report(s), the Member concerned should inform the DSB about its intention in relation to the implementation.¹³⁷ Article 21.1 of the DSU states that:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

Therefore, the inconsistent measure should be immediately withdrawn or modified. However, if the prompt implementation of the recommendations and rulings is impracticable, the Member concerned can implement them within a reasonable period of time.¹³⁸ If the parties cannot reach an agreement on a reasonable period of time within 45 days of the adoption of the report(s), the issue can be referred to arbitration by the original complainant. To start the arbitration under Article 21.3(c) of the DSU, the parties should agree on the arbitrator.¹³⁹ If within 10 days the parties failed to choose the arbitrator(s), a party can request the Director General of the WTO to appoint the arbitrator(s) in 10 days. Even though no qualifications and requirements are defined by the DSU for an arbitrator under Article 21.3(c), a practice has been established that a current or former Member of the Appellate Body be appointed as the arbitrator. The arbitration should come to a conclusion within 90 days after the adoption of the report by the DSB, but the parties can agree to exceed that time limit. Although the arbitration award on reasonable period of time should not be adopted by the DSB, it must be declared to the parties and circulated to the WTO Members as an unrestricted document.

The WTO Members can raise the issue of implementation with the DSB. The implementation will be put on the DSB agenda six months after start of the reasonable period of time and remains on the agenda until it is resolved. The Member concerned should inform the DSB about its progress in the

¹³⁷ Article 21.3 of the DSU.

¹³⁸ Ibid.

¹³⁹ To date, there has been only one case in which there were two arbitrators (DG appointed) and this was in EC-Hormones – eventually the award was rendered by one arbitrator only (Lacarte) as the second arbitrator resigned after becoming a minister in the Brazilian government.

implementation, at least 10 days before any DSB meeting.¹⁴⁰ During the reasonable period of time, the Member concerned should implement the recommendation and ruling and withdraw or modify the inconsistent measure. If the parties disagree on whether the measure taken by the responding party to implement is consistent with the WTO agreements, or they disagree on whether such measure exists, the issue can be resolved under DSU Article 21.5 through a compliance panel proceeding. The difference between an original panel report and a compliance panel report is that the latter does not benefit from a reasonable period of time for implementation. Therefore, the complainant can, immediately after the adoption of a report, request the DSB for authorization of suspension of the concessions or other obligations against the responding party.

If during the reasonable period of time the implementation is not achieved, the complainant can request negotiations on compensation with the responding party. It bears considering that compensation is just a temporary remedy until full compliance is achieved and the inconsistent measure is withdrawn or modified. If within 20 days after the reasonable period of time has expired, no agreement is achieved upon compensation, the complainant can request the DSB for authorization to apply the suspension of concessions or other obligations. The suspension of concessions or retaliation is also not a final remedy and can be applied until the full implementation is achieved. The authorization for retaliation is decided in the DSB within 30 days after expiration of the reasonable period of time.

The level of requested retaliation can be challenged by the responding party. The responding party can also claim that the principles and procedures for suspension embodied in the DSU Article 22.3 have not been followed. If the mentioned objections are raised, before the authorization is issued by the DSB, the issue(s) will be referred to arbitration under Article 22.6 of the DSU. The members of the original panel will be the arbitrators in an Article 22.6 arbitration. However, if they are not available, the Director-General will appoint the arbitrators within 10 days of the expiry of the reasonable period of time. The award must be submitted to the DSB and then the authorization for retaliation will be issued.

¹⁴⁰ See Article 21.6 of the DSU.

It bears mentioning that the DSU has not defined clear rules on post-retaliation and, therefore, if full compliance is not achieved, there is not a clear procedure to deal with this non-implementation issue and when exactly the retaliation can be terminated.

2.3.6. Recognition and Enforcement Under WTO DSS and International Commercial Arbitration

One of the most important issues regarding private sector dispute arbitration is the recognition and enforcement of awards by the domestic legal systems. That is why the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was concluded on 10 June 1958.¹⁴¹ This convention is recognized as an important instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when dealing with an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States. There is also another convention for international investment arbitration which is the Washington Convention 1965.¹⁴²

However, as shortly discussed above, the WTO DSS includes its enforcement mechanisms which do not require any recognition and enforcement of the rulings by the domestic law system of the losing party. Therefore, decisions and recommendations of the WTO DSS are not enforceable by national courts and the New York Convention (or other similar instruments) do not apply to arbitral decisions rendered under WTO agreements. It bears considering that under the WTO DSU, only WTO Members can bring claims under the DSS, even though the private sectors can lobby their governments raise disputes against other WTO Members.

¹⁴¹ For further information on the New York Convention see its website at: <http://www.newyorkconvention.org>, last visited on 6-3-2017.

¹⁴² The most well-known instrument on international investment arbitration is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, more commonly known as the ICSID Convention or the Washington Convention. Procedures in each individual dispute are dictated by the terms of the governing investment treaty. Iran has not joined this Convention yet.

Iran's requirements under Principle 139 include both private and governmental disputes on 'state and public property'. Therefore, for resolving state and public property disputes, either between private or governmental parties, Iran's constitutional requirements should be observed. As it will be discussed in chapter six, in the adoption process of the Iran-United States Claims Tribunal (including both international commercial and international investment arbitrations) Iran's Parliament requested the Government to observe the requirements enshrined in Principle 139, however these requirements have not been recognized by this Tribunal.¹⁴³

One important difference between the enforcement of international private law awards and WTO rulings through Iran's domestic law system is that the recognition and enforcement of awards on the basis of the New York Convention by Iran's courts have reciprocal basis.¹⁴⁴ However, the enforcement of the WTO DSS rulings cannot be reciprocal.

In other words, to enforce WTO DSS rulings Iran's legal system will not follow a reciprocal basis. In addition, the WTO DSS rulings do not need to be recognized and enforced by Iran's court system. To conclude, for enforcing the WTO DSS rulings, there are mechanisms different from those that are being applied by private international law dispute settlement systems.

2.3.7. Quasi-judicial

After the introduction to the nature of the WTO dispute settlement system, it must be established whether this system is judicial, arbitration or quasi-judicial. This clarification is important because, as discussed earlier, the WTO dispute settlement system is exclusive and compulsory and when there is a dispute raised between the WTO Members over the covered agreements, it should be resolved only through the DSS. On the basis of the compulsory jurisdiction, when a WTO Member takes a dispute to the WTO dispute

¹⁴³ For further information see section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

¹⁴⁴ Section (b) of Iran's reservation to the New York Convention states: 'In accordance with article 1 (3) of the Convention, the Islamic Republic of Iran will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State Party to the Convention.', for further information see the website of the New York Convention.

settlement system to be resolved, the other party to the dispute shall participate in the dispute process. This obligation of the WTO Members to participate in the disputes brought against them in the WTO dispute settlement system can be, as discussed in subsequent chapters, in conflict with Iran's constitutional rules on dispute settlement. Principle 139 of Iran's Constitution provides that resolving a dispute on public and state property or referring it to arbitration, if it is between Iranians and non-Iranians, in each case should be approved by the Parliament.¹⁴⁵ This can result into a conflict between Iran's Constitution and the WTO compulsory jurisdiction. This is because disputes should, case-by-case be first sent to the Parliament and, if the Parliament agrees, then Iran can participate in the dispute settlement process.

There is, however, an interpretation of Principle 139 which states that judicial settlement systems do not have to observe the requirements of this Principle.¹⁴⁶ Therefore, if the WTO dispute settlement system were judicial, there would be no conflict between its compulsory jurisdiction and Iran's domestic legal system. To find out whether the WTO dispute settlement system is judicial or arbitration or quasi-judicial, the mechanisms of this system should be examined.

As introduced in this chapter, the WTO dispute settlement system includes several mechanisms to resolve a dispute which are:

- Consultations to reach a mutually-agreed solution;
- Panel proceedings (adjudication);
- Appellate Body proceedings (adjudication);
- Arbitration; and
- Good Offices, Conciliation and Mediation.

The WTO Appellate Body in *US/Canada – Continued Suspension* introduced a clear criterion to distinguish between the DSS mechanisms:

Consultations, mediation, good offices, and arbitration are, however, alternatives to compulsory adjudication and require the consent of the parties. In the absence of such consent, they cannot lead to a binding decision. Thus, it is important to distinguish between these consensual

¹⁴⁵ This Principle will be discussed in detail in chapters five and six.

¹⁴⁶ This interpretation is discussed in chapter five, section 5.3.3. (Authentic Interpretation).

means of dispute resolution, which are always at the Members' disposal, and adjudication through panel proceedings, which are compulsory.¹⁴⁷

According to the Appellate Body's view, a criterion which can be helpful to distinguish between the DSS mechanisms is to establish whether a mechanism is consent-based or compulsory.¹⁴⁸ In addition, the Appellate Body has introduced a list of compulsory and consent-based mechanisms. This view of the Appellate Body, as well as the nature of the DSS mechanisms, show that the WTO dispute settlement system includes two different kinds of mechanisms. Due to this fact, under most legal systems, a system is judicial if it is standing and compulsory. Judicial systems, such as courts, usually enjoy compulsory jurisdiction and procedures and standing judges who make the final decisions. However, arbitration or other non-judicial mechanisms are usually consent based and *ad hoc*. In most arbitration systems, the arbitrators, code of conduct and working procedures and whether the awards will be binding are based on the mutual agreement between the parties to the dispute.¹⁴⁹ Article 1:1(a) of Iran's Law Concerning International Commercial Arbitration¹⁵⁰ defines arbitration as:

Arbitration includes settlement of disputes between the litigation parties outside the court by mutually acceptable or appointed arbitrators being natural person(s) or legal entity(ies).¹⁵¹

As it is stated in Article 1:1(a), the mutual agreement between parties is a recognized criterion to distinguish between court and arbitration in Iran's legal system.

¹⁴⁷ Appellate Body Reports, US/Canada-Continued Suspension, para. 340.

¹⁴⁸ This can be helpful to distinguish generally between arbitration and adjudicative mechanisms. However, in the WTO dispute settlement system, Arbitration under Article 25 requires the consent of the parties; arbitration under Article 21.3(c) and 22.6 does not.

¹⁴⁹ It bears mentioning that there are always some exceptions in both court and arbitration systems in domestic, regional or multilateral levels.

¹⁵⁰ [قانون داوری تجاری بین المللی], (Translation WIPO).

¹⁵¹ Iran's Law Concerning International Commercial Arbitration, for the full text see, www.wipo.int/wipolex/en/text.jsp?file_id=248930, last visited on 1-10-2016.

It bears mentioning that, due to the fact that the DSS includes consensual and also non-consent mechanisms, it cannot be claimed that it is a judicial system and it is considered as a quasi-judicial system. Therefore, as, in addition to judicial mechanisms, the DSS includes non-judicial dispute settlement tools, it cannot be excluded from the scope of Iran's constitutional requirement on dispute settlement, even if it is asserted that the panel and Appellate Body are judicial bodies, the settlement of a dispute under the DSS starts with non-judicial mechanisms which are negotiations/consultations. The establishment of a panel can be requested from the Dispute Settlement Body (DSB) if the consultations fail. In addition, there are arbitrations under Articles 21.3 and 22.6 which are usually a part of the enforcement mechanisms of the DSS.¹⁵² That means that the application of non-judicial mechanisms under the DSU gives rise to a *prima facie* conflict between Iran's legal system and the WTO DSU.

Moreover, the panel and Appellate Body proceedings are not merely judicial. For instance, the panel is *ad hoc* and not standing and should be established by the DSB (which is a non-judicial institution); the parties can agree on *ad hoc* working procedures; the panel should submit its draft report as an interim review to the parties for comment; recommendations and rulings of the panel and also the Appellate Body should be adopted by the DSB (a diplomatic institution). Therefore, the DSS, due to having judicial and non-judicial dispute settlement mechanisms, can be called a quasi-judicial system. Consequentially there is a *prima facie* conflict between the DSU and Principle 139 of the Iranian Constitution.

¹⁵² Arbitration under Article 21.3: If it is impracticable for the Member concerned to implement rulings and recommendations adopted by the DSB immediately, and the parties cannot agree upon a reasonable period of time (RPT) for implementation, this (RPT) can be referred to arbitration to be determined.

Arbitration under Article 22.6: When the implementation is not achieved during the reasonable period of time and the complainant requests for authorization from the DSB for the suspension of concessions or other obligations (retaliation) against the responding party, the responding party can object to the level of suspension; or claims that the required principles and procedures have not been followed. These issues can be referred to arbitration to be determined.

2.4. The Single Undertaking Principle and the DSU

This section of the chapter delineates the concept of single undertaking. As discussed in chapter one,¹⁵³ there is the principle of a single undertaking in the WTO Agreement which provides that the WTO multilateral agreements as a whole are integral parts of the WTO Agreement. On the basis of Article XVI(5) of the WTO Agreement, the Dispute Settlement Understanding is excluded from any reservation. This means that to accede to the WTO a country should accept all of the WTO multilateral agreements altogether. The conflict between the WTO Dispute Settlement Understanding and Principle 139 of Iran's Constitution described in the preceding section therefore impedes Iran from acceding to the WTO.

This means that in its accession to the World Trade Organization Iran must simultaneously accede to the WTO Dispute Settlement Understanding and therefore accept the mandatory (compulsory) and exclusive jurisdiction of the WTO panels, the Appellate Body and arbitration to govern in the case of any dispute arising with regard to the WTO agreements.

Even abandoning the single undertaking approach for future negotiations does not mean that Iran would be allowed to join the WTO without signing the DSU. The DSU is part of the single package that came out of the Uruguay Round and, if Iran wants to join the WTO, it will have to sign up to that single package (as all other Members have done). If anything, a number of acceding Members were forced to accept WTO-plus obligations and WTO-minus rights (see China). Accepting a Member on WTO-minus obligations (e.g. not being subject to the DSU disciplines) will not happen, even if the single undertaking approach would not be followed in future negotiations. Unless the WTO Agreement provision on the single undertaking will be amended.

To conclude, the single undertaking principle requires that Iran accedes to all multilateral agreements annexed to the WTO Agreement (including the DSU). The WTO DSS has a compulsory jurisdiction over disputes concerning rights and obligations under the WTO agreements. This can be in conflict with the requirements of Principle 139 of Iran's Constitution on dispute settlement.

¹⁵³ See chapter one, section 1.4.2. (Single Undertaking Principle).

2.5. How to Observe the Principle 139 in Acceding to the WTO

As it will be discussed in detail in further chapters, Iran's Constitution contains requirements on the settlement of disputes if state and public property is involved. Principle 139 of Iran's Constitution states that when there is a dispute between Iranian and non-Iranian parties over state and public property, to settle the dispute or to refer it to arbitration, an authorization by the Parliament is required. It can be asserted that, in acceding to the WTO, Iran can get a general authorization from its Parliament for all disputes over the WTO agreements to be settled in the DSS. However, there is a term in Principle 139 which provides that the disputes, should be sent to the Parliament for authorization on a case-by-case basis. This element can be in conflict with the compulsory jurisdiction of the DSS. Because when Iran is called to a dispute as a responding party after its accession to the WTO, its participation cannot be blocked by any transnational or national institutions.

It bears mentioning that there are also other interpretations of Principle 139 (as discussed in detail chapters five and six of this dissertation) which can be helpful in removing this conflict between Iran's Constitution and the WTO dispute settlement system. To join the WTO, Iran needs to remove this legal impediment, otherwise its accession would be blocked.

2.6. Conclusion

In this chapter, it was shortly discussed that disputes under the GATT were initially settled between Contracting Parties on the basis of a power-based system. In the course of the years the system changed into a rules-based system. This new system that was developed by the GATT and then negotiated and designed in the Uruguay Round formed the WTO DSS, which constituted a significant further step towards rules-based dispute settlement.

To have a better understanding of the nature of the WTO dispute settlement system, the compulsory, exclusive and contentious nature of the DSS jurisdiction was described. It was reviewed which disputes fall within the ambit of the DSS jurisdiction and who can have direct access and for which type of complaints. Then some key features which differentiate the DSS from other international dispute settlement systems were introduced. The DSS institutions and mechanisms including the Dispute Settlement Body (DSB), consultations, panels, Appellate Body, arbitration, good offices, conciliation

and mediation under the DSS were presented. How a dispute is treated and resolved under the DSS mechanisms including the implementation and enforcement mechanisms was also shortly discussed.

After introducing the WTO dispute settlement mechanisms, it was briefly discussed that the WTO contains several dispute settlement mechanisms including the consultations, panel and Appellate Body proceedings (adjudication), arbitration, good offices, conciliation and mediation. The WTO dispute settlement system is an exceptional system which includes almost all advanced and traditional/political and legal methods of dispute settlement. Unlike other dispute settlement systems, the WTO Members can enjoy a mix of arbitration and adjudication methods during the proceedings of a dispute which is unique and distinguishes it from other dispute settlement systems. Therefore, the DSS has a quasi-judicial nature and can therefore be in conflict with the requirements embodied in Principle 139 of Iran's Constitution when Iran is involved in a dispute. This, as discussed in the subsequent chapters, constitutes a legal impediment to accession of Iran.

It has also been shown in this chapter that the DSS has compulsory jurisdiction and, accordingly, if Iran joins the WTO, it has an obligation to participate in the disputes taken against it before the DSS institutions. This compulsory participation, however, cannot be accepted by Iran's constitutional rules on dispute settlement stated in Principle 139. To avoid a conflict between Iran's domestic legal system and the WTO DSU, Iran may want to opt out of the DSU when acceding to the WTO. This would, however, contravene the single undertaking principle, which does not permit any country to opt out of any WTO agreements including the DSU when joining the WTO. Similarly, making reservations under the DSU is forbidden on statutory grounds. Therefore, the legal impediment for accession cannot be avoided under WTO rules.

It was therefore briefly mentioned how Iran can observe the rules of Principle 139 when acceding to the WTO. A detailed examination will be presented in the subsequent chapters.

In the following chapter, Iran's constitutional system will be discussed.

Chapter 3. Iran's Constitutional System

3.1. Introduction

Iran applied for membership of the World Trade Organization in 1996, however, it has not yet been able to accede to the WTO. Its prolonged accession process is due to a number of factors. Among these factors delaying the accession process are some legal impediments. One of these impediments concerns the dispute settlement system and is analyzed in this dissertation.

The first question which has been addressed in this dissertation is to find out whether there is any legal conflict between Iran's Constitution and the WTO agreements. Chapter one introduced the rules on the accession process to the WTO, which must be observed by Iran. It was concluded that Iran needs to adopt all of the WTO multilateral agreements as a whole, even though they may conflict with Iran's legal system. Chapter two introduced the WTO dispute settlement system including its compulsory jurisdiction. This chapter (three) introduces Iran's constitutional system to illustrate which constitutional institutions are involved in the adoption process of Iran's accession to the WTO. This can be helpful to find out whether the above-mentioned legal conflict can be removed through amending Iran's constitutional rules which cause an inconsistency with the WTO. The subsequent chapters will discuss what role Iran's constitutional institutions can play in removing the legal conflict.

The legal impediments should be removed to accelerate Iran's accession to the WTO. To remove a legal impediment, it is necessary to find a solution within Iran's legal system. This is because Iran has applied for accession to an existing treaty and changing the treaty may be very difficult and cumbersome.

Iran has a legal system which is, to some extent, different from the legal systems in other countries. There are, however, also similarities. As in other legal systems, Iran's laws require that any accession to a multilateral organization must take place in conformity with its constitutional authorities. Therefore, a solution to remove the mentioned legal impediments must be found that is compatible with Iran's laws, including Iran's Constitution. Any proposed solution that might be viable in other legal systems but disregards

the main elements of Iran's system would not work or may result in other problems during or after the accession process to the WTO.

This chapter presents those elements of Iran's legal system as set out in the Constitution of the Islamic Republic of Iran that are relevant for this research. These include the Leader, Assembly of Experts and the Executive, Legislature and the Judiciary. Therefore, important institutions and elements of the government – in general – that form an integral part of the country's legal system are described. A good understanding of the working of Iran's constitutional institutions is important in order to better comprehend the nature of the legal impediments and the proposed solutions that will be described in chapter seven.

The civilization and culture of Iran has had a significant impact on Iran's legal system. Therefore, this chapter also briefly discusses the roots of Iranian civilization and culture. The main religions and in particular Islam have played a considerable role in the evolution of Iran's legal system. Iran's first Constitution was instituted on the basis of Iran's history, such as what happened during the *Safavid* Dynasty (1501-1736) (which was mostly based on Islamic rules) as well as new events of the modern world in the beginning of the twentieth century. Therefore, Iran's 1905 Constitution and its amendments included the rules taken from the main roots of Iran's legal system. It can be said that one of the documents which embodied the main elements of the current constitutional rules of Iran was the Constitution of 1905. Later the theory of *Velayate Faqih* was developed in the 1960s and later, namely after the Islamic Revolution when a new government was being formed, became the basis of the model of government (sovereignty) in Iran. This kind of Islamic sovereignty was chosen through a referendum by Iranians after the Islamic Revolution in 1979. The current Constitution was designed based on the theory of *Velayate Faqih* as well as the developing legal system which originated in Iran's historical civilization.

In this chapter the elements of Iran's Constitution, which has formulated most of the constitutional rules and institutions, are discussed briefly. After that, the role of the Leader in Iran's legal system – as one of the constitutional institutions – is clarified. This is discussed in this chapter because one of the solutions suggested in chapter seven is based on some of the powers and duties of the Leader as set out in Iran's Constitution. It bears mentioning that

the position of the Leader in Iran's Constitution is higher than the Executive, the Legislature and the Judiciary and therefore it takes precedence over the other institutions in the discussion in this chapter.

Also, the institution which appoints the Leader is discussed in this chapter and subsequently, the Executive – which is granted the task by the Constitution to perform the negotiations of accession to multilateral agreements – is introduced. When the negotiations are finalized, the protocol of accession should be adopted by Iran's Parliament. Therefore, the Legislature, which is composed of the Parliament and the Guardian Council, is briefly discussed to give a general understanding of their role in approving and finalizing the approval of Iran's accession to the WTO. Yet another of the solutions suggested in chapter seven is related to the working of the National Expediency Council. This constitutional institution usually resolves the disputes between the Parliament and the Guardian Council, including those on accession to the multilateral agreements. The National Expediency Council therefore merits close attention. This Council is not a part of the Executive, Legislature or the Judiciary. Iran's Constitution has defined this Council in the chapter on the Leader's powers and duties. However, it is discussed here, as well as other constitutional institutions, on the basis of the role each one plays in turn in the adoption process of Iran's accession to the WTO.

An important question which is taken under consideration in this chapter is whether judgments of non-Muslim judges in multilateral dispute settlement systems can be recognized under Iran's legal system. This is important because most WTO dispute settlement panelists, Appellate Body Members and arbitrators can be non-Muslims. If their rulings (judgments and awards) are not recognized by Iran's legal system, this can result in a legal impediment to Iran's accession to the WTO.

The discussion of Iran's legal system presented in this chapter can be helpful for analyzing other possible impediments to Iran's accession process (such as the possible conflict between the TRIPS and Iran's Constitution Principle 4), which are not discussed in this dissertation. A complete and detailed discussion of Iran's legal system is beyond the limited subject of this chapter. There are aspects of Iran's constitutional system, such as city and provincial councils, the armies, etc. which are not discussed in this chapter.

The discussions presented from two perspectives in this chapter:

- An introduction to the historical background, cornerstones and important institutions of Iran's constitutional system;
- The interactions of the relevant constitutional institutions with regard to Iran's adoption process of multilateral agreements including the WTO accession.

3.2. General Comments

This chapter briefly introduces the constitutional system of Iran. There are some specific legal terms which are used in Iran's Constitution, which may not be known in other legal systems. Moreover, Iran's Constitution includes some constitutional institutions which do not exist in other similar legal systems. Therefore, these terms and institutions are very briefly defined and presented here.

- Constitution's Principle(s): the term 'principle' is the same as 'article' in other constitutions. The term article is replaced by principle in Iran's Constitution to show that the principles of the Constitution have primacy over other legislation and regulations that are approved by constitutional institutions, such as the National Expediency Council, Parliament and Government. Therefore, in the case of a conflict between the Constitutions' principles and other laws and regulations, the Constitution prevails.

- *Velayate Faqih*: This term is used to describe a theory which was developed by Imam Khomeini, the first Leader of Iran. The theory of *Velayate Faqih* originated from Islam and from the time of Prophet Muhammad. The theory holds that *Valiye Faqih* (the Leader) has the same power as the Prophet had in his time to establish and practice the Islamic government. This theory, which was presented by Imam Khomeini before the Islamic Revolution, is the cornerstones of Iran's Constitution and its institutions.

- Islamic authority/sovereignty: The terms Islamic authority and Islamic sovereignty describe a model of government that is based on the theory of *Velayate Faqih* and Islamic rules. After Iran's Islamic Revolution in 1979, an Islamic authority was designed including some new constitutional institutions

such as the Leader, Assembly of Experts, Islamic Consultative Assembly, Guardian Council and National Expediency Council.

- *Mujtahid*: This term is used for the person who has *Ijtihad* (Islamic jurisprudence). *Ijtihad* is defined as a technical term of Islamic law that describes the process of making a legal decision by an independent interpretation of the legal sources, the *Quran* and the *Sunnah*. It bears mentioning that *Ijtihad* is one of the most important qualifications which should be met for a candidate to be elected and appointed as the Leader, members of Assembly of Experts, Head of the Judiciary, etc. A *Mujtahid* can also be called *Faqih*, which means a person who is an expert in Islamic law and possesses *Ijtihad*.

- Leader: Under Iran's Constitution, the Leader is a person who possesses *Ijtihad* and is elected by the Assembly of Experts among candidates who have the required qualifications stated in the relevant principles of Iran's Constitution.

- Assembly of Experts: This is a constitutional institution that is composed of those experts who possess *Ijtihad* and are elected by the people to elect the Leader and supervise his activities.

- Islamic Consultative Assembly: This term is used for the Parliament in Iran's Constitution. It includes 290 members who are directly elected by the people. In addition to approving legislation, the Parliament supervises the Government's activities.

- Guardian Council: This is a constitutional institution and, together with the Islamic Consultative Assembly (Parliament), forms the Legislature in Iran's legal system. The Guardian Council, which is composed of six *Faqihs* (Islamic Experts) and six law experts, has the task to check the constitutionality of approvals made by the Parliament.

- National Expediency Council: This is a constitutional institution which is granted by Iran's Constitution several tasks, among which is to resolve the disputes between the Parliament and the Guardian Council where the Parliament's approval is rejected by the Guardian Council because of inconsistency with the Constitution.

Executive: This term is used for the Government and the Board of Ministers. The President is directly elected by the people for four years and the ministers who form the Board of Ministers are introduced by the President to the Parliament to be appointed.

Legislature: This term is used for the Islamic Consultative Assembly (Parliament) and the Guardian Council.

Judiciary: This term is used to describe the court system of Iran which is administered by the Head of Judiciary who is appointed by the Leader.

3.3. The Historical Background of Iran's Legal System

To join the WTO, Iran's laws, legislation and administrative procedures should be consistent with the WTO agreements.¹ One of the conflicts between Iran's legal system and WTO law, as will be discussed in the subsequent chapters, is the conflict between Principle 139 of Iran's Constitution and the WTO Dispute Settlement Understanding (DSU). This conflict can prolong or block Iran's accession to the WTO. To remove this conflict, the Constitution can be amended. However, this could result in serious inconsistencies and infringements later in the WTO post accession process. In a legal system such as is represented by Iran's Constitution, the rules have evolved over centuries and the main elements of Iran's civilization originate in its history, culture and religions. Therefore, the mere removal of a controversial rule could result in other problems in Iran's legal system, which later could result in more complicated legal impediments to trade and the development of the country.

To find the best solution for removing the legal impediments to the accession, the main elements of Iran's constitutional system and its roots in Iran's civilization should be examined. This chapter briefly introduces the historic roots and origins of Iran's constitutional system.

Since the very start of Iran's history, there have been legal systems originating from the religion of Zoroastrianism. The legal systems developed over time and were later inspired by Islam.

¹ See WTO Agreement Article XVI:4.

Over the centuries, Iran's rulers applied their religious understandings of Zoroastrianism that – among other factors – originated in the Persian culture and civilization, to establish their governmental institutions. These governmental institutions also included justice administrations.⁵³

Islam has of course also deeply influenced the Iranian legal system directly. Not only because, as mentioned above, Islam was integrated into the Iranian civilization after the religion was introduced to Iranians, but also due to the different version of the Shia school of Islam from other Islamic schools. Both the first (1905) and the second (1979) constitutions of Iran were mostly based on Islamic rules. The constitutions are briefly discussed below in sections 3.3.1 and 3.3.2.

3.3.1. The First Constitution of Iran

For thousands of years, there was just the will of the King in governing the country. During the *Safavid* dynasty (1501-1736), the Shia school of Islam was formally recognized by the government. However, there was not yet any constitution in the country. In 1905 a constitutional revolution occurred in Iran. That was a revolution which resulted in the formation of two of parliaments: A National Consultative Assembly and the Senate.² The Parliament represented 'the whole of the people of Iran, who [thus] participate in the economic and political affairs of the country'.³

The first Constitution was drafted in five chapters and with 51 principles.⁴ In addition to forming the two chambers of Parliament (the National Consultative Assembly and the Senate) and their respective powers and duties, the Constitution addressed the voting system and how to deal with bills and legislation drafts. The Constitution was amended several times since.

² Under Principle 27 (1) of Iran's first Constitution, the Legislature was composed of the king, National Consultative Assembly and the Senate. The enacted laws by the National Consultative Assembly also had to be adopted by the Senate and then signed by the king to be enforced. See Iran's Parliament Research Centre website at: <http://rc.majlis.ir/fa/law/show/133414>, last visited 1-10-2016.

³ A part of the Principle 2 of Iran's first Constitution which was later changed through a supplement to the Constitution. Foundation for Iranian Studies, the text of Iran's 1906 Constitution and Its Supplement, for the full text see: <http://fis-iran.org/en/resources/legaldoc/iranconstitution>, last visited 1-10-2016.

⁴ According to Iran's legal system, 'Principle' is used instead of 'Article'.

The first Supplement to the Constitution was adopted in 1907. This Supplement added – in 10 new chapters and 107 principles – important rules on the rights of the people. These rights were drafted and were well ahead of their time in the region in sense of protecting the rights of people. The Constitution, as amended in 1907, embodied most human rights rules years before the formulation of the first international declaration of human rights, even though some national constitutions contained such rights before the universal declaration. The legal system of Iran included rules on all aspects of law such as human rights since Iran's 1905 Constitution. It bears considering that human rights protection is regarded by public law as an important factor to be contained in each standard constitution.⁵

Under the 1905 Constitution, the people were the main source of power.⁶ In other words, on the basis of this, there should have been a democracy in Iran. This is to some extent true with regard to a part of the Legislature, the National Consultative Assembly, with regard to which Principle 2 of the Constitution states:

The National Consultative Assembly represents the whole of the people of Iran, who [thus] participate in the economic and political affairs of the country.⁷

Before the revolution of 1905 there were two determinants involved with the sovereignty in Iran: the monarchy and religion. However, the Constitution introduced the element of people to have a king-religion-people triangle of power in Iran.

⁵ John Locke says that the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. (Chapter 9, Line 124, John Locke, *Second Treatise on Government* (1690)). (See B. Josiah, *The United States, Law, Government, Religion, Christianity, and Illegalities* (Author Solutions, Incorporated, 2011), p. 30). This law which limits state and individual rights is usually the constitution. In some countries in amending the constitution, those articles including human rights cannot be changed. For instance, Article 79, Section 3 of Germany's Constitution states that articles 1 and 20 (the basic principles which include human rights) cannot be changed.

⁶ Principle 26 of Iran's 1905 Constitution.

⁷ Principle 2 of Iran's 1905 Constitution, (Translation S.A).

3.3.2. Islamic Revolution and the 1979 Constitution

Since 1963, *Imam Khomeini* (the leader of 1979 Revolution) and other religious experts increasingly criticized the government which was not loyal to the rules of the Constitution, democracy and Islam. Therefore, they were arrested and sent into exile. The people who supported such leaders were also severely punished. The people were not satisfied with the governmental measures which continuously infringed their basic fundamental rights including the right of self-determination. However, any protest or criticism resulted in imprisonment and torture. This policy of the government lasted for decades. Ultimately, these systematic and grave infringements of the Constitution, human rights and Islamic rules resulted in the Islamic revolution of 1979.

Before the 1979 Revolution, *Imam Khomeini*, who was exiled, first went to Turkey, then to Iraq and later to France. In Iraq, he developed the theory of *Velayate Faqih*. The theory of *Velayate Faqih* concerns the formation of a complete Islamic government. After the 1979 Islamic Revolution, this theory became the cornerstone of the Islamic government of Iran.

The Islamic Revolution started on 11 February 1979. This victory was achieved, as the Preamble states, at a high price:

Its cost was the blood of more than 60,000 martyrs, 100,000 wounded and with damaged health, and billions of *Toomans* of financial loss; all amid cries of 'Independence', 'Freedom', and 'Islamic Rule'.⁸

Before the Islamic Revolution, *Imam Khomeini*, who was in Paris, formed the *Islamic Council of Islamic Revolution*. This Council was established to form the *Provisional Revolutionary Government* (the Interim Government of Iran) and worked as a temporary Parliament to adopt the necessary decisions. On the proposal of the Council, the first Prime Minister was appointed by the Leader

⁸ For the full text of the Constitution see: <http://www.wipo.int/edocs/lexdocs/laws/en/ir/iroo1en.pdf>, last visited on 1-10-2016. (Translation of Iran's Constitution: The International Society for Iranian Studies, WIPO, 47:1, 159-200 (2014)).

some days before the victory of the Revolution. The Prime Minister later appointed his Board of Ministers.⁹

In March 1979, less than two months after the Revolution, the people were asked in a national referendum to choose the form of government. The people were asked to vote on whether they want an Islamic form of government or not. The referendum was held to let people choose their own government, rather than imposing a pre-chosen one upon them. On 30 and 31 March 1979, the people declared their decision:

... through the affirmative vote of a majority of 98.2% of eligible voters, held after the victorious Islamic Revolution led by the eminent *Marji' al-Taqlid*, Ayatullah al-Uzma Imam Khomeyni.¹⁰

Also, the new Constitution was approved by the people through a referendum on 2 and 3 December 1979. Therefore, they directly declared their views on the Islamic style of sovereignty and on all the detailed articles (principles) of the Constitution.

3.4. Iran's Constitutional System: Main Elements and Institutions

The historical background of Iran's constitutional system, the 1905 Constitution and how the Islamic Revolution and 1979 Constitution established were briefly discussed.

Before discussing the interactions between the Iranian constitutional institutions regarding the adoption process of multilateral agreements including the WTO agreements, the cornerstone and elements of Iran's constitutional system, as well as important constitutional institutions are introduced to give a better understanding of the difference between Iran's model of government and other constitutional systems.

⁹ For further information see the internet site of Islamic Revolution Document Centre at: <http://www.irdc.ir/fa/content/6187/default.aspx>, last visited on 1-10-2016.

¹⁰ Principle 1 of Iran's 1979 Constitution, (Translation WIPO).

3.4.1. Cornerstones/Elements of Iran's Constitutional System

Iran's constitutional system is based on elements having a unique nature, even though there are also similarities with other systems. Some features of the nature and origins of these elements are introduced below.

The following cornerstones and elements of Iran's constitutional system will be discussed in turn below:

- Islamic sovereignty;
- Islamic element (Islamic sovereignty in Iran);
- The theory of *Velayate Faqih*; and
- the republic element.

Islamic sovereignty (as discussed below) is the basis for the theory of *Velayate Faqih*. The constitutional institutions in Iran are established on the basis of this theory. In line with the 'Islamic' element, the 'republic' also plays a very important role in Iran's constitutional system. As discussed below, the Leader, Members of Assembly of Experts, Head of the Executive (President), members of the Parliament and members of the village, district, city, municipality, and province councils are elected by the people. The members of other constitutional institutions are also indirectly elected by the people. For instance, some institutions are elected and appointed either by the Parliament (such as the ministers of the Government) or the Leader (such as members of the National Expediency Council and Head of Judiciary); or both (such as the Guardian Council). The candidates for the membership of all constitutional institutions require some specific qualifications taken from 'Islamic' and 'republic' elements of the Iranian model of government. This model of democracy, which is called 'Islamic sovereignty', and its roots deserve to be examined closely.

3.4.1.1. Islamic sovereignty

Islam and the republic are two important characteristics of Iran's 1979 Constitution. These two characteristics are recognized as the main cornerstones of Iran's model of government (sovereignty). Sovereignty refers to the authority of the whole government. These characteristics originated from the rich culture and civilization of Iran over time. Iran's Constitution is anchored in these characteristics and, as a consequence, the legitimacy and authority of the Government and the formation and design of the

constitutional institutions derive from these two characteristics and in particular from Islam: this is described as 'Islamic sovereignty' by Iranian scholars. This section presents the integral characteristics of the 1979 Constitution and the Islamic sovereignty that it created. Additional elements that further explain these characteristics are introduced briefly.

Islam, as the most important element of the 1979 Revolution, was approved by the people through a referendum. Principle 1 of the 1979 Constitution states:

The government of Iran is an Islamic Republic, which the nation of Iran based on its long-held belief in the rule of the truth and the justice of the Quran...¹¹

The recognition of the Islamic principle of truth and Quranic justice distinguishes Iran's Constitution from other constitutions of other Islamic countries. This is due to the unique characteristics of this sovereignty stated in the 1979 Constitution. To highlight some of the differences, first we can examine the Preamble of the Constitution. There is a clarification provided for the Islamic sovereignty in the Preamble:

Islamic Government is founded on a basis of *Velayat Faqih* as put forward by Imam Khomeini at the height of the intense emotion and strangulation under the despotic regime. This created a specific motivation and new field of advance for the Muslim people; and opened up the true path for the religious fight of Islam, pressing forward the struggle of the committed Muslim combatants, inside and outside the country...¹²

This text refers to the theory of *Velayate Faqih*, which was described by Imam Khomeini decades before the revolution when he was in exile in Iraq. Imam Khomeini gave lectures on the theory of *Velayate Faqih* to his students and then published a book entitled: *Islamic Sovereignty*.

¹¹ Principle 1 of Iran's 1979 Constitution. (Translation WIPO: <http://www.wipo.int/wipolex/en/profile.jsp?code=IR>).

¹² A part of Iran's 1979 Constitution Preamble.

Principle 2 of Iran's Constitution states that the 'The Islamic Republic is a system based on faith in:

1. one God (There is no god but God), the exclusive attribution of sovereignty and the legislation of law to Him, and the necessity of surrender to His commands;
2. divine inspiration and its foundational role in the articulation of the laws;
3. resurrection and its constructive role in explanation of laws;
4. the justice of God in creation and legislation;
5. belief in the Imams (*Imamat*), continuous leadership, and its fundamental role in the continuity of the Islamic Revolution;
6. the wondrous and exalted status of human beings and their freedom, which must be endowed with responsibility, before God. These are achieved through:
 - a. the continuous striving to reason (*Ejtehad*) of qualified jurists (*Foqaha*) who possess the necessary qualifications based on the book (Qur'an) and the Traditions of the infallibles (*Ma'sumin*), peace be upon them all;
 - b. the employment of sciences, technologies, and advanced human experience with the aim of their further development;
 - c. the negation of all kinds of oppression, authoritarianism, or the acceptance of domination, which secures justice, political and economic, social, and cultural independence and national unity.¹³

There is another Principle in the Constitution which restates the definition of Islamic Sovereignty clearly by describing its origin and legitimacy. Principle 56 of the Constitution states:

Absolute sovereignty over the world and the human being belongs to God. And it is He who has made human beings sovereign over their

¹³ Principle 2 of Iran's Constitution.

social destiny. No one can take this divine right away from human beings or apply it to the interests of a special person or group. The nation exercises this God-given right in ways that are specified in the following Principles.¹⁴

As it can be seen in Principle 56, although absolute sovereignty is recognized for God, there is a linear relationship between God and the people's sovereignty. This means that Islamic sovereignty is based on the will of God and the people together. This kind of sovereignty which originates in the theory of *Velayate Faqih* is very unique due to the lack of such a definition in the conventional and customary theories of sovereignty in other countries.

In Shia-Islam the sovereignty originates from God and the People and there is a linear relationship between them. Javan Arasteh (2005)¹⁵ describes this as a different form of sovereignty. He says:

Islamic Republic of Iran's Constitution demonstrates an image of national sovereignty, in which, the people govern over their destiny. However, in demonstrating it, it looks at the heaven and assumes that as a gift from god. This is a medium view between the secular democracy and the uncontrollable theocracy in Christianity. Islamic Republic's national sovereignty is based on none of these two above-mentioned views of democracy and theocracy. It is in the linear relationship with god. However, in secular democracies, the sovereignty is absolute.¹⁶

As the nature of sovereignty (model of government) in Iran's Constitution is different from that of other democracies in the world, some elements of Islamic sovereignty are briefly described below: the Islamic element (1) and Republic element (2).

¹⁴ Principle 1 of Iran's Constitution.

¹⁵ Hossein Javan Arasteh is a public law lecturer in Qom University, Iran.

¹⁶ H. Javan Arasteh, *The Basis of Sovereignty in Islamic Republic of Iran's Constitution* [مبنای حاکمیت در قانون اساسی جمهوری اسلامی ایران], (Secretariat of the Assembly of Experts 2005 [دبیرخانه مجلس خبرگان]), Farsi, available at <http://www.majlesekhobregan.ir>, last visited on 1-10-2016, (Translation S.A).

3.4.1.2. *Islamic element*

As explained above, the model of government in Iran is different from most countries because it is designed on the basis of Islamic sovereignty, which constitutes the main source of inspiration for designing the legal position of Iran's constitutional institutions.

Islamic sovereignty, which was developed decades before the Islamic Revolution, was the main source for most principles of the 1979 Constitution. Principle 1 of Iran's Constitution embodies this kind of sovereignty in the form of an '*Islamic Republic*'. There are different forms of democracy in the world. A democracy can be based on religion. Non-religion based, which is usually called 'secular democracy', is a very common model of democracy which has been practiced in most countries.

A religion-based democracy can include different kinds of sovereignties. This is due to the general meaning of 'religion'.

In addition, there are different models of government in Islamic countries. This is because, as discussed below, Islam has theorized the basis of sovereignty. Some Islamic countries have never experienced any kind of election, although their system might be called an Islamic democracy. In Islam, there are a number of schools and interpretations. Therefore, the Islamic democracy can include different models of government due to different interpretations of Islam and therefore also the recognition of the role of people in decision making differs.

As mentioned earlier, Imam Khomeini developed and taught the theory of *Velayate Faqih* or Islamic sovereignty. This theory was developed on the basis of the Shia school of Islam. In this theory, there is a form of sovereignty similar to the model of governments in the time of Prophet Muhammad and Imam Ali.

To get a general understanding of 'Islamic democracy' on the basis of Imam Khomeini's view and Iran's Constitution, some definitions have been put forward by the relevant scholars. Ayatollah Javadi Amoli, a prominent Islamic scholar and philosopher, states with regard to religious democracy:

Religious democracy is a model of political system which on the basis of a true submission of people to the sacred God and in the framework of religion's guidance recognizes people's rational policy and their sovereignty.¹⁷

As Ayatollah Javadi Amoli says, people's role in decision making has been recognized by the religion of Islam. This is the Islamic definition of democracy in the Islamic model of government in Iran, even though this is not recognized in some Islamic countries, such as the model of government in Saudi Arabia.

To find out whether there is any difference between the above-mentioned definition of democracy in Islam and the type practiced in other countries, some definitions are discussed briefly as follows.

There are many definitions introduced for democracy, one of which is given by Larry Jay Diamond and Marc F. Plattner (2006):

Democracy is a form of government in which all eligible citizens have an equal say in the decisions that affect their lives.¹⁸

However, this definition can be challenged on the grounds that the criteria on whether people are eligible for the election or not is usually defined by domestic rules. A better definition of democracy is given by the Merriam-Webster Concise Encyclopedia, which states that democracy is a:

Form of government in which supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodic free elections.¹⁹

¹⁷ M. Mir Ahmadi, "Religious Democracy in the View of Ayatollah Javadi Amoli [مردم [مصلنامه حکمت اسرا] Hekmat Esra Quarterly]", *Hekmat Esra Quarterly* [مصلنامه حکمت اسرا] (2011), p. 24, (Translation S.A).

¹⁸ L. Diamond and MF Plattner *Electoral Systems and Democracy* (Johns Hopkins University Press, 2006), p. 168.

¹⁹ Merriam-Webster Concise Encyclopaedia, see:
<http://www.merriam-webster.com/dictionary/democracy>, last visited 1-10-2016.

To recognize which definition of democracy is accepted by the current model of government in Iran, the adoption process of the government in Iran and the role of people in that process are mentioned briefly as follows.

After the Islamic Revolution, one referendum was held to approve the Islamic democracy and then a national election took place to elect the members of the Constitutional Parliament. Subsequently another referendum was held to approve the Constitution. In addition, there have been many direct elections, such as the elections to appoint the presidents of the republic (every four years), or members of national Parliament (every four years), or members of councils (every four years), or members of Assembly of Experts which appoints the Leader, a referendum on approving the Constitution's reforms, etc. Therefore, in Iran, almost every year people participate in some election to demonstrate their role in national decision making. These elections directly or indirectly have let people clearly and freely practice their right of self-determination as an Islamic democracy. Therefore, since the start of the Islamic Revolution, democracy has been practiced in Iran.

However, an important question is what is an Islamic model of democracy and is there any difference between an Islamic model democracy and other forms of democracies, for example in the form of a secular or liberal democracy? Answering this question is beyond the limited scope of this thesis.

3.4.1.3. *The theory of Velayate Faqih*

After a brief introduction to Islamic sovereignty, the theory of *Velayate Faqih* is discussed in: a general introduction (A), the history of *Velayate Faqih* (B), grounds of support for the theory of *Velayate Faqih* (C), Imam Khomeini's interpretation of theory of *Velayate Faqih* (D), the required qualifications of the Leader in an Islamic government (E)

(A) General introduction

Velayate Faqih is usually considered to be the most important cornerstone of Iran's Constitution and the main source of authority for the model of an Islamic-republic democracy in Iran. Therefore, it is the origin of the power and also the underlying rationale regarding the distribution of power among Iran's constitutional institutions. As some of the solutions that will be

suggested in the final chapter of this thesis are based on the legal position of the constitutional institutions, the theory of *Velayate Faqih* is discussed below. This section presents a short history, some general background information on the theory and the necessary qualifications of the ruler (*Valiye Faqih*) and will be predominantly based on Imam Khomeini's book '*Islamic Government: Governance of the Jurist*'.

Principle 5 of Iran's Constitution is the first principle of Iran's Constitution addressing the theory of *Velayate Faqih*:

During the absence (Ghayba) of his holiness, the Lord of the Age, May God all mighty hasten his appearance, the sovereignty of the command [of God] and religious leadership of the community [of believers] in the Islamic Republic of Iran is the responsibility of the faqih who is just, pious, knowledgeable about his era, courageous, and a capable and efficient administrator, as indicated in Principle 107.²⁰

This Principle suggests that the theory of *Velayate Faqih* is related to the governance of a *Faqih*. Indeed, the theory of *Velayate Faqih* covers many aspects such as the Executive, Legislative and Judiciary. Unfortunately, given the scope of the dissertation, they cannot be discussed in full here. It is therefore addressed here in order to present a concise and simplified description.

Islamic laws and regulations include rules on subjects such as taxes, national defense, and legal and penal commandments. The nature and characteristics of these rules indicate that they cannot be implemented except through a government. Prophet Muhammad and his successor established Islamic governments to enforce the rules and achieve the Islamic goals.

The above-mentioned rules are for all eternity and are not limited to the time of the Prophet Muhammad. That is why a successor was appointed by the Prophet Muhammad to enforce them after him. Therefore, these rules should also be enforced in the present time in order to achieve the aims stated by Islam for the welfare of human beings. However, the rules need a government

²⁰ Principle 5 of Iran's Constitution.

so that they will be enforced and the ruler should be knowledgeable enough of the nature and aims of these rules.

There are several requirements stated by Shia School of Islam for a ruler. A jurist who has the stated qualifications by Islam is called: *Faqih*. There is a duty for *Faqih*s to establish the Islamic government, to enforce the Islamic laws and regulations and to achieve the specific goals. If a *Faqih* does so, he is entitled to the full authority that accrued to the Prophet Muhammad. He will be appointed Prophet Muhammad's successor. Of course he does not enjoy his dignity and status nor specific powers such as those that can only be granted by God. An Islamic government can be established only when people recognize and welcome it, even though its legitimacy does not originate from the people.

It is worth mentioning that a specific model and method of the government is not described in Imam Khomeini's book on the theory of *Velayate Faqih*, even though the main principles are stated. Therefore, an Islamic government based on this theory can be achieved through different methods that are employed on the basis of their particular environment. In other words, the time of employing this theory and also the place in which the theory is applied can affect the kind of methods which derive from this theory. In Iran it is currently combined with a model of democracy that is comparable to those employed in other civilized countries; in accordance with Iran's Constitution, it took the particular form of a republic. That is why the kind of sovereignty addressed in Iran's Constitution is similar to the one in the time of Prophet Muhammad; however the methods applied at the times of Prophet Mohammad might have been different. Imam Khomeini has stated in his book that:

We have stressed the main principles of the subject. Now it is up to the present and future generations to discuss it further and reflect upon it, and to find a way to translate it into reality, eschewing all forms of apathy, weakness and despair. God Almighty willing, by means of mutual consultation and the exchange of views, they will develop a method for establishing an Islamic government with all its various branches and departments. They will entrust the affairs of government to persons who are honest, intelligent, believing, and competent and remove traitors from the control of the government, the homeland, and

the treasury of the Muslims. Let them be assured that God Almighty is with them.²¹

(B) The history of *Velayate Faqih*

The theory of *Velayate Faqih*, upon which Iran's model of government and the constitutional system is based, does not originate from the times of the Islamic Revolution. Also, Imam Khomeini was not the first to discuss the theory of *Velayate Faqih*. Imam Khomeini stated in his book:

As I stated previously, the subject of the governance of *Faqih* is not something new that I have invented; since the very beginning, it has been mentioned continually.²²

Almost all Shia School experts believe in the necessity of such a government, which is an important part of the belief of Shia Islam regarding the sovereignty of Prophet Muhammad's successors. However, there have been debates on the extent of a *Faqih's* power as a ruler in this type of Islamic government. Five jurists have been mentioned in Imam Khomeini's book, who have discussed or practiced some part of the theory of *Velayate Faqih* in the past. Therefore, the decrees of these four *Faqih's* are taken as a part of the history of practiced theory of *Velayate Faqih* that were first used and applied in the community. This history is also the origin of the theory which was applied by other *Faqih's* before the Islamic revolution in Iran and then was developed to be the cornerstone of one of the most important rules of Iran's Constitution. The five *Faqih's* are as follows:

- *Mīrzā Hasan Shirāzi* (1814-1894)²³ who *inter alia* prohibited the use of tobacco for a specific period of time.

²¹ S. R. Musavi Khomeini, "Islamic Government: Governance of the Jurist", trans. H. Algar, (Alhoda UK, 2002), available at <http://www.al-islam.org/islamicgovernment/title.htm>, last visited on 1-10-2016.

²² Musavi Khomeini (2002).

²³ *Mīrzā Hasan Shirāzi* [میرزا حسن شیرازی]: a mujtahid, d. 1312/1894. After the production and marketing of tobacco in Iran had been made the monopoly of a British company, he declared in December 1891 that 'the use of tobacco is tantamount to war against the Imam of the Age.' In obedience to his declaration, all of Iran boycotted tobacco, forcing the cancellation of the concession in early 1892. See H. Algar, *Religion and State in Iran*,

The ruling given by the late *Mīrzā Hasan Shīrāzī* prohibiting the use of tobacco was in effect a governmental ruling; hence all other *Fuqahā* were obliged to follow it, and indeed the great *Ulamā* (Islamic leaders) of Iran did follow it, with only a few exceptions.²⁴

- *Mīrzā Muhammad Taqī Shīrāzī* (1840-1921)²⁵ issued a defense decree in his time. His ordinance was followed by all Islamic jurists because it was a governmental ruling.
- Muhammad Hussein Kashif al-Ghita (1876-1954)²⁶ who also issued an ordinance on defense.
- *Mulla Ahmad Narāqī* (1771-1829)²⁷ who was of the opinion that the *Fuqaha* are entitled to exercise all the worldly functions of the most noble Messenger(s).²⁸
- *Mirza Muhammad Hussein Naini* (1860-1936)²⁹ who also discussed the theory of Velayate Faqih.

1785-1906: *The Role of the Ulama in the Qajar Period*, Reprint ed. (University of California Press, 1980), p. 211.

²⁴ Musavi Khomeini (2002).

²⁵ *Mīrzā Muhammad Taqī Shīrāzī* [میرزا محمد تقی شیرازی]: a pupil of *Mīrzā Hasan* and an important Shiah scholar, d. 1338/1921. He was a leading force in the resistance by the Shiah 'ulama opposed to the imposition of British rule in Iraq at the end of World War I. See Muhammad Hirz ad-Din, Ma'arif ar-Rijal (Najaf, 1384/1964), II, (Arabic), pp. 215-218; A.S.R. Khomeini, *Islam & Revolution (The Writings and Declarations of Imam Khomeini)*, trans. H. Algar (Kegan Paul International, 2013), p. 162.

²⁶ Kashif al-Ghita: more fully, Muhammad Husayn Kāshif al-Ghitā [محمد حسین کاشف الغطاء], a leading Shiah scholar of Iraq, 1295/1876-1373-1954. He was active politically as well as academically throughout his life. See the biographical introduction to his *Asl ash-Shiah wa Usūluhā*, 7th ed. (Beirut, 1377/1957), pp. 7-21. The book is translated into English as: M.H. Kashif al-Ghitā, *The Origin of Shī'ite Islam and Its Principles*, trans. Ansarian (CreateSpace Independent Publishing Platform, 2014).

²⁷ *Narāqī*: that is, Hājj Mullah Ahmad Naraqi [حاج ملا احمد نراقی], a scholar of importance in the early nineteenth century, d. 1244/1829. He not only was a prolific author, but also clashed repeatedly with the monarch of his day, Fath 'Ali Shah. See Algar (1980), p. 57.

²⁸ Musavi Khomeini (2002).

²⁹ *Naini*: that is, *Mirza Muhammad Husayn Naini* [میرزا محمد حسین نائینی], an important scholar of the early twentieth century, 1277/1860-1354/1936. Concerning his book on Shia political theory, *Tanbih al-Ummah wa Tanzih al-Millah* (Arabic), see A.H. Hairi, *Shī'ism and Constitutionalism in Iran: A Study of the Role Played by the Persian Residents of Iraq in Iranian Politics* (Brill Archive, 1977), p. 109.

Imam Khomeini has emphasized that this is not a new theory and that it has been discussed and practiced before him. He wrote:

In any case, this subject is by no means new. I have simply examined it at greater length with reference to the different branches of government, to give the subject greater clarity for my listeners. In accordance with the commands of God Almighty, as expressed in His Book and by the tongue of His Most Noble Messenger (s), I have also set forth certain matters of importance to the present age.³⁰

The theory of *Velayate Faqih* is based on a number of reasons discussed in his book. These reasons are grounds of support for the theory of *Velayate Faqih* and are discussed briefly in the next section.

(C) Grounds of support for the theory of *Velayate Faqih*

There are many reasons to support the theory of *Velayate Faqih* and reasons indicating the necessity of establishing an Islamic government. The most important reasons are enlisted briefly below.

Firstly, most verses of Quran concern social, economic, legal, and political subjects. As Imam Khomeini says, the ratio of Quranic verses which concern the affairs of society, to those which concern ritual worship is more than a hundred to one.³¹ Therefore, it can be concluded that the Quran is a book which not only includes worship and religious matters, it contains also many rules and several models for government, economy, law, etc. That is why the establishment of a government is necessary to implement/practice the rules stated in the Quran.

Secondly, most Hadiths (a tradition setting forth a saying or deed of the Prophet, or in Shia usage, a saying of one of the 12 Imams) are on social, economic, legal, and political subjects. It bears mentioning that among almost 50 sections of the corpus of *hadith*, which include all the ordinances of Islam, not more than three or four sections concern matters of ritual worship and the duties of man toward his creator. A few sections relate to issues of ethics, and the rest are about social, economic, legal, and political questions, i.e. the

³⁰ Musavi Khomeini (2002).

³¹ Ibid.

society.³² Therefore, to implement the rules other than the ones on merely worship and religious matters, a government should be established.

Thirdly, all books on Islamic law include different aspects of social life. As Islamic law is a progressive and comprehensive system, almost all of its books include detailed discussions on different areas of law, such as judicial procedure, social transactions, penal, retribution, international relations, regulations pertaining to peace and war, private and public fields.³³ Therefore, to practice the theories and rules stated by Islamic experts on social life, a government should be established.

Fourthly, the laws and regulations that are formulated by Islam can be enforced through a government. In other words, when a law is established, it is also necessary to create an Executive branch to enforce it, because the laws cannot automatically be enforced in a religious system. Therefore, an Islamic system should have an Executive branch.³⁴

Fifthly, to achieve the goals of Islam and also the welfare of the people, it is necessary that a ruler establishes the Islamic government (the necessity of an Islamic government).³⁵

Sixth, the Prophet Muhammad established a government and enforced Islamic law. In the time of the Prophet, not only the laws were formulated, but they were also implemented. Prophet Muhammad was an executor of the law. For instance, he implemented the penal rules of Islam. Therefore, in addition to the establishment of government and necessary rules, some organs to execute those laws and regulations should also be established.³⁶

Seventh, the Prophet Muhammad appointed a successor to enforce the Islamic law after him. Imam Ali, the appointed successor of the Prophet, also established an Islamic government.³⁷ Therefore, the establishment of a

³² Musavi Khomeini (2002).

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

government after Prophet Muhammad to implement the Islamic rules and models is necessary.

Eighth, some verses³⁸ of the Quran state that the Islamic rules are not limited to a certain time and place. Therefore, the Islamic law should also be enforced in our time and through an Islamic government. Under one of the verses of the Quran, the ordinances of Islam are not limited with respect to time or place. They are permanent and must be enforced until the end of time.³⁹

And Ninth, Islam as a whole defines a complete social system. This system includes all aspects of people's lives and is not limited to worship matters.

The laws of the *shariah* embrace a diverse body of laws and regulation, which amounts to a complete social system. In this system of laws, all the needs of man have been met: his dealings with his neighbours, fellow citizens, and clan, as well as children and relatives; the concerns of private and marital life; regulations concerning war and peace and intercourse with other nations; penal and commercial law; and regulations pertaining to trade, industry and agriculture. Islamic law contains provisions relating to the preliminaries of marriage and the form in which it should be contracted, and others relating to the development of the embryo in the womb, and what food the parents should eat at the time of conception. It further stipulates the duties that are incumbent upon them while the infant is being suckled, and specifies how the child should be reared, and how the husband and the wife should relate to each other and to their children. Islam provides laws and instructions for all of these matters, aiming, as it does, to produce integrated and virtuous human beings who are walking embodiments of the law, or, to put it differently, the law's voluntary and instinctive executors. It is obvious, then, how much care Islam devotes to government and the political and economic relations of

³⁸ See, for example, Quran: Surah Ibrahim (14:52), Surah Yunus (10:2), Surah al-Hajj (22:49), Surah al-Ahzab (33:40), and Surah Yaa-Sin (36:70), (Arabic).

³⁹ Musavi Khomeini (2002).

society, with goal of creating conditions conducive to the production of morally upright and virtuous human beings.⁴⁰

There are also other reasons as well as a number of *Hadiths*⁴¹ stated by the Prophet Muhammad, Imam Ali (the successor of the Prophet) and other Imams of Shia Islam which are analyzed by Imam Khomeini in order to justify the theory of *Velayate Faqih* and the necessity of an Islamic Government.

It is worth mentioning that the theory of *Velayate Faqih*, as it is also stated in Principle 5 of Iran's Constitution, discusses the duty of jurists to establish an Islamic government during the Occultation. This is because the twelfth Imam of Shia Muslims, who is also the twelfth successor of the Prophet Muhammad is in Occultation. According to Shia belief, Imam Mahdi absented himself from the physical plane but remained in communication with his followers through a succession of four appointed deputies. At the death of the fourth deputy no successor was named, and the Greater Occultation (*Ghaybat-i Kubra*) began, and continues to this day.⁴² Therefore, Islamic jurists have the authority to establish an Islamic government until the advent of Imam Mahdi.⁴³ The theory of *Velayate Faqih* is to continue the full system of Islamic rules including social, economic and political rules during the Occultation. It is a theory to establish an Islamic government to prevent the Islamic laws and

⁴⁰ Ibid.

⁴¹ The tradition setting forth sayings or deeds of the Prophet, or in Shia usage, of one of the Twelve Imams.

⁴² Lesser Occultation [غيبت صغرى]: *Ghaybat-i Sughrah*, the period of about 70 years (260/872-329/939) when, according to Shia belief, Muhammad al-Mahdi, the Twelfth Imam, absented himself from the physical plane but remained in communication with his followers through a succession of four appointed deputies, viz., 'Uthman ibn Sa'id, Muhammad ibn 'Uthman, Husayn ibn Ruh, and 'Ali ibn Muhammad. At the death of the fourth deputy no successor was named, and the Greater Occultation (*Ghaybat-i Kubrah* [غيبت كبرى]) began and continues to this day. See M. B. A. Sadr, "An Inquiry Concerning Al-Mahdi," (CreateSpace Independent Publishing Platform, 2014), available at <https://books.google.nl/books?id=goReCAAAQBAJ>, last visited on 1-10-2016; J.M. Hussain, "The Occultation of the Twelfth Imam (A Historical Background)", (Createspace Independent Pub, 2013) available at: <https://books.google.nl/books?id=5SL4ngEACAAJ>, last visited on 1-10-2016; Ahlulbayt Organization, Al-Imam Al-Mahdi, the Just Leader of Humanity, (Createspace Independent Pub., 2014) available at <https://books.google.nl/books?id=hk3hoAEACAAJ>, last visited on 1-10-2016.

⁴³ Imam Mahdi is the twelfth Imam and successor of the Prophet Muhammad.

rules from being abandoned until the advent of Imam Mahdi. *Velayate Faqih* is a theory to let Muslims keep going on the right path to achieve the goals stated by *Shariah*. After introducing some grounds of supporting the theory of *Velayate Faqih*, it is important to know what Imam Khomeini meant by this theory. The interpretation of Imam Khomeini with regard to the theory of *Velayate Faqih* is discussed briefly in the next section.

(D) Imam Khomeini's interpretation of the theory of *Velayate Faqih*

It is important to discuss the interpretation of Imam Khomeini with regard to the theory of *Velayate Faqih* here in order to recognize from where the power and legal position of the Leader in Iran's Constitution originates. It bears mentioning that one of the solutions discussed in the last chapter of this book is taken from the legal position and power of the Leader in Iran's constitutional system. In other words, one of the solutions to remove the legal impediment from Iran's accession to the WTO comes from the power of the Leader in the Constitution. This power is granted to the Leader on the basis of Imam Khomeini's interpretation of *Velayate Faqih*. That is to say that without practicing this interpretation in Iran's constitutional system, the dispute between the Parliament and the Guardian Council on Iran's accession to the WTO (as is described later in subsequent chapters) could not be resolved easily and therefore the mentioned legal impediment could not be removed.

There are other characteristics of Islamic sovereignty (*Velayate Faqih*), which are also emphasized in Imam Khomeini's book, among which some issues such as law, security, welfare, non-discrimination, equality, and trust of the people need more explanations that are as follows.

Firstly, Islamic government is a government of law. As Imam Khomeini has mentioned in his book, the Islamic government is neither tyrannical nor absolute. Under the theory of *Velayate Faqih*, the rulers are subject to a certain set of conditions in governing and administering the country. In an Islamic sovereignty, the government should respect and observe the law. In other

words, law is the actual ruler in an Islamic government and Muslims and all people of the country are free within the limits laid down by the law.⁴⁴

Secondly, complete security under rule of law is one of the central elements of an Islamic government. In other words, when an Islamic government is formed, everybody can live with complete security under the protection of the law.⁴⁵

Thirdly, in an Islamic government, the public welfare and the interest of the people are ensured.⁴⁶

Fourthly, non-discrimination between Muslims and non-Muslims is one of the principal rules in an Islamic government.⁴⁷

Fifthly, no privilege for the ruler and his family is recognized by the theory of *Velayate Faqih* in an Islamic model of government. In addition, the principle of equality of all people should be protected in this type of government.⁴⁸

Sixth, an Islamic government is based on the people's trust. In Imam Khomeini's book on *Velayate Faqih* it is stated that:

We must establish a government that will enjoy the trust of the people, one in which the people have confidence and to which they will be able to entrust their destiny.⁴⁹

As it can be seen in the above-mentioned characteristics, in an Islamic sovereignty based on the theory of *Velayate Faqih*, that the rights of people are protected by law. The ruler does not enjoy any kind of privileges and the people, including Muslims and non-Muslims, without suffering any discrimination can happily live together.

There are some qualifications stated in *Shariah* for a ruler of Islamic government, some of which are mentioned below.

⁴⁴ Musavi Khomeini (2002).

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

(E) The required qualifications of the Leader in an Islamic government

Under Iran's Constitution, the Leader is appointed among the candidates who possess the required qualifications. The most important qualification is to be a *Faqih* (Jurist). This is also very important for the Assembly of Experts, as an institution which supervises over the activities and decisions of the Leader. And if the Leader loses this qualification of *Faqih* (jurist), he will be disqualified.

Under the theory of *Velayate Faqih*, it is a duty for the jurists who are qualified enough under the requirements stated by *Shariah* to establish an Islamic government. To be a *Faqih* (jurist), a person should study in Islamic schools for decades to be informed enough with regard to the required knowledge of the Islamic sources. A jurist should be able to analyze and deduce the Islamic rules on the basis of the Islamic sources. In addition to having the required level of knowledge, jurists should be just. Justice can be defined in many ways, however here it means that jurists are supposed to avoid engaging in sins and crimes. Imam Khomeini believes that if jurists lose their justice, they will automatically be disqualified as a jurist or a governor to rule a government:

[Rulers are qualified] as long as they do not concern themselves with the illicit desires, pleasures, and wealth of this world. And also, as long as they do not sink into the morass of worldly ambition. If a *Faqih* has - as his aim - the accumulation of worldly wealth, he is no longer just and cannot be the trustee of the Most Noble Messenger and the executor of the ordinances of Islam.⁵⁰

'Knowledge' and 'justice' are thus the most important requirements for a 'jurist', even though there are also other qualifications. The qualifications of a Leader are stated in the Principles of Iran's Constitution. These qualifications will be discussed later.

In an Islamic country, jurists, after achieving the necessary qualifications, should be trusted by people to be a ruler. Otherwise, they cannot establish an Islamic government. Therefore, the role of the people in trusting a jurist and recognizing him as a ruler is very important. Not only a jurist, but also the

⁵⁰ Musavi Khomeini (2002).

successors of the Prophet Muhammad could not establish an Islamic government, unless the people would accept them. For instance, Imam Ali, the first successor of the Prophet Muhammad, even though he was appointed by the Prophet as a ruler, waited for many years until people recognized him as a ruler to establish a just Islamic government.

It bears mentioning that when Imam Khomeini wrote his book on *Velayate Faqih*, the sovereignty was still under full control of the monarchy in Iran. Therefore, he theorized about an Islamic government and developed parts of the theory. Later, when the Islamic Revolution succeeded, Imam Khomeini and other jurists gained a better chance to practice such a kind of government. Therefore, they developed it through drafting Iran's Constitution. When Iranians accepted the Islamic government through a national referendum, a method was established to practice the theory of *Velayate Faqih*. As mentioned earlier, Imam Khomeini did not suggest any method in his book for the establishment and practice of an Islamic government. That is why experts chose and advanced a model of democracy that took the form of a republic to be the practicing method of Islamic government in Iran. The republic element of Iran's model of government is introduced in the following section.

3.4.1.4. Republic element

After discussing the 'Islamic' element of Iran's model of government, there is another important element which should be taken into consideration. Principle 1 of Iran's Constitution states: 'The government of Iran is an Islamic Republic'. The definition of the Islamic government under Iran's Constitution is discussed above. What is technically meant by the term 'republic' can be better understood through law dictionaries.

For instance, Black's Law Dictionary defines republic as: 'a form of government which derives all its powers directly or indirectly from the general body of citizens.'⁵¹ And according to Duhaime's Law Dictionary: 'A

⁵¹ Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., <http://thelawdictionary.org>, last visited on 1-10-2016.

form of government where the law-makers and administrators are chosen by the people and not king or queen, or chosen thereby.⁵²

Under Iran's Constitution, a republic is defined in a similar way to the above-mentioned definitions. Principle 6 of the Constitution states that 'The country's affairs must be administered by reliance on the public vote, and through elections.' Under Iran's constitutional system, almost all constitutional institutions shall be either directly or indirectly appointed by the people. This right under Islam, as stated in Principle 56 of the Constitution,⁵³ is granted by the God to the peoples and no one can take this divine right from them.

As discussed below in the following sections of this chapter, the Leader, Assembly of Experts, President, members of the Legislature (Parliament and the Guardian Council), the councils of the provinces, cities, and districts, etc. are directly or indirectly appointed by the people's vote. For instance, the people directly appoint the members of the Assembly of Experts which appoints the Leader. Therefore, the power is indirectly granted by the people to the Leader. In addition, the powers and duties of each Constitutional institution is either clearly stated by the Constitution or referred to parliamentary legislations. Principle 110 has defined the powers and duties of the Leader, among which are the tasks of balancing the powers (the Executive, the Legislature and the Judiciary) and resolving their disputes. Also, some members of the National Expediency Council are appointed by the Leader and the rest directly by the people, which is granted the task to resolve the disputes between the Guardian Council and the Parliament, for instance on accession to the multilateral agreements including dispute settlement mechanisms.

Some constitutional institutions which can be involved in the adoption process of multilateral agreements are introduced in this chapter and also in chapter four.

After introducing the historical background and also the roots of Iran's constitutional system, Islamic sovereignty and the republic element under

⁵² Duhaime's Law Dictionary, <http://www.duhaime.org>, last visited on 1-10-2016.

⁵³ For the text of Principle 56 see section 3.4.1.1. (Islamic sovereignty) in this chapter.

Iran's Constitution were discussed above. In the next section the division of powers in Iran is presented in detail.

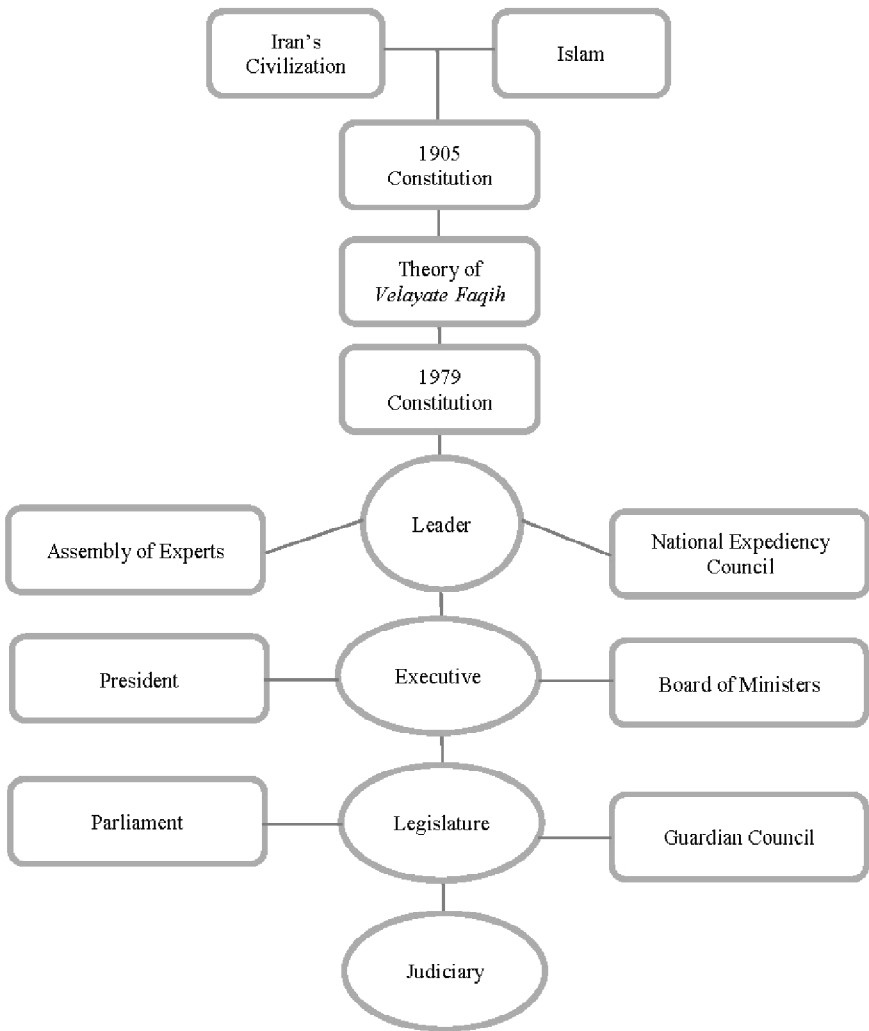
3.5. Division of Powers /Institutions

The cornerstone and Islamic and republic elements of Iran's constitutional system were discussed. There are some constitutional institutions which can be involved in Iran's adoption process of multilateral agreements and organizations, such as the WTO. These institutions are introduced in turn below.

- The Leader (under Iran's Constitution);
- Assembly of Experts;
- The Executive (Government and Board of Ministers);
- The Legislature (Parliament and Guardian Council);
- The National Expediency Council; and
- The Judiciary (Courts)

Diagram A illustrates the background of Iran's Constitution, the main constitutional institutions and also the division of power in this country, some of which, are discussed in this research.

Diagram A. Iran's Constitutional Institutions



3.5.1 The Leader (Under Iran's Constitution)

Under Iran's Constitution, the Leader occupies a central role in the decision-making process. He is able to reconcile difficult legal interpretations under the Constitution and thereby resolve conflicts. In light of the legal impediments of WTO accession analyzed in this dissertation, the Leader therefore deserves special attention. This section is devoted to describing the constitutional powers and duties of the leader.

Under Iran's Constitution and the theory of *Velayate Faqih*, the Leader has the highest legal position in the Islamic Republic of Iran.⁵⁴ Principle 57 of Iran's Constitution states:

The governing powers in the Islamic Republic of Iran consist of the Legislature, the Executive, and the Judiciary. They operate under the supervision of the absolute authority of the command (*velayat-i amr*) and religious leadership (*imamat*) of the community of believers and according to the forthcoming articles of this law. These powers are independent of one another.⁵⁵

Principle 113 of the Constitution clarifies that the Leader is the highest Executive official in the country, even before the President.⁵⁶ The position of the Leader is thus different from the legal position of political and also religious leaders in other countries. It is not just a symbolic position but endowed with powers and duties which can be applied by him, as long as the application of his power does not conflict with the actions of other constitutional authorities. In other words, although the Leader has the highest position in Iran's Constitution, there are specific powers and duties that are defined for him as well as for other constitutional institutions. Other than resolving the conflicts between the institutions, the implementation of the Leader's powers usually does not limit the powers of other institutions.

⁵⁴ As stated by Principle 57, the Leader has the highest position among Iran's constitutional institutions and other institutions such as the Executive, Legislature and Judiciary work under his supervision. That is also why the Leader is discussed before other institutions in this chapter.

⁵⁵ Principle 57 of Iran's Constitution.

⁵⁶ Principle 113 of Iran's Constitution.

The position of the Leader is therefore not comparable to that of kings or queens in constitutional monarchies or the role of presidents in some countries,⁵⁷ even though in countries like United States and France the president enjoys relatively more powers than their colleagues in most other democratic countries.

To safeguard that an able person assumes the position of a leader there are several democratic safeguards and requirements as stated in the Constitution regarding the qualities of the leader.

Firstly, the Leader should be elected by the Assembly of Experts composed of members directly elected by people;⁵⁸

Secondly, to be able to become the Leader, the candidate should possess qualities (discussed below) which are to be assessed by the Assembly;⁵⁹

Thirdly, the Leader can exercise only those powers and duties clearly stated in the Constitution⁶⁰ (discussed below in section 3.5.1);

Fourthly, the Leader's exercise of power is under the Assembly of Expert's supervision;⁶¹

Fifthly, the Leader will be 'disqualified' whenever he loses the necessary qualifications stated in the Constitution⁶² (discussed below in sections 3.5.1 and 3.5.2);

Sixthly, the Leader cannot appoint his successors;⁶³

⁵⁷ There are at least 45 monarchy systems in the world, among which 12 countries are European: Andorra, Antigua and Barbuda, Australia, Bahamas, Bahrain, Barbados, Belgium, Belize, Bhutan, Brunei, Cambodia, Canada, Denmark, Grenada, Jamaica, Japan, Jordan, Kuwait, Lesotho, Liechtenstein, Luxembourg, Malaysia, Monaco, Morocco, Netherlands, New Zealand, Norway, Oman, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Solomon Islands, Spain, Swaziland, Sweden, Thailand, Tonga, Tuvalu, United Arab Emirates, United Kingdom, Vatican City.

⁵⁸ Principle 107 of Iran's Constitution.

⁵⁹ Principle 109 of Iran's Constitution.

⁶⁰ Principle 110 of Iran's Constitution.

⁶¹ Principle 111 of Iran's Constitution.

⁶² Ibid.

Seventhly, the Leader does not enjoy any specific privileges such as exemption from laws and regulations;⁶⁴

The qualities and qualifications of a candidate for Leadership in Iran are closely related to the theory of *Velayate Faqih*. The qualities and qualifications are stated in detail in Iran's Constitution.

Principle 5 of Iran's Constitution provides that the leader should be:

- A just and pious *Faqih*;
- Fully aware of the circumstances of his age;
- Courageous;
- Resourceful; and
- Possessed of administrative ability.

In addition, there is another Principle in the Constitution which includes a list of Leader's qualifications. Principle 109 of Iran's Constitution provides the qualifications as follows:

- Scholarly qualifications for issuing religious rulings (*fatwa*) concerning various discussions in jurisprudence;
- Required justice and piety in leading the Islamic community;
- Sound political and social perspective, prudence, courage, sufficient administrative capability, and power for leadership.

Pursuant to Principle 107 of Iran's Constitution, a Leader should be elected from a list of qualified candidates on the basis of the following criteria:

... If they find one of them the most knowledgeable about the rules and subjects of jurisprudence, or political and social issues, or acceptability by the public, or significance in any one of the qualifications indicated in Principle 109, that person shall be selected as the leader; otherwise, one of the Experts is chosen and declared as the leader...⁶⁵

⁶³ Principles 107, 109 and 111 of Iran's Constitution.

⁶⁴ Principle 107 of Iran's Constitution.

⁶⁵ A part of Principle 107 of Iran's Constitution.

Under Principle 109, in case of a multiplicity of persons fulfilling the above qualifications and conditions, the person possessing the better jurisprudential and political perspicacity will be given preference.⁶⁶

As presented above, the Leader in the Islamic Republic of Iran must possess specific qualities and qualifications during his term in office. The Leader will be disqualified if he loses these qualities during his appointment. Therefore, there is a constitutional authority evaluating the qualities and qualifications of leadership. The Constitution conferred this task upon the Assembly of Experts. This Assembly and its powers and duties will be discussed later in this dissertation in section 3.5.2. Before this, however, the powers and duties of the Leader are reviewed.

3.5.1.1. Powers and Duties of the Leader

There are specific powers and duties stated for the Leader in Iran's Constitution. In this section, first the absolute power of the Leader (A), then the Leader's tasks under Principle 110 (B), and finally his responsibilities (C) are shortly presented below.

(A) Absolute power theory under Principle 57

Imam Khomeini has argued that the leader should have the same powers as the Prophet Muhammad had in his time. This is recognized by Principle 57 of the Constitution where it is stated that the Leader has 'the absolute *Vilayat Al-Amr*' (the absolute leadership). The question therefore arises if the power of the Leader is 'absolute'. Absolute power is taken from the theory of *Velayate Faqih* and is very general and, even though it is stated in Principle 57, its framework is not clear and has not been fully practiced yet. Therefore, it is believed that after more practice of the theory, the framework can be better clarified and understood.

It bears mentioning that, since Iran's revolution (1979), even though the Constitution has recognized a kind of absolute power for the Leaders, it has never been practiced that way. Therefore, Iran's Leaders have always taken the limited tasks, especially those stated in Principle 110, into consideration to

⁶⁶ A part of Principle 109 of Iran's Constitution.

have a balance between institutions in Iran's constitutional system. Also, it should be taken into account that the supervision of the Assembly of Experts over the Leader's decisions and conduct by itself limits the absolute power. That is to say that the mentioned control and supervision system cannot be reconciled with the absolute power theory on the basis of Principle 57 or the theory of *Velayate Faqih*.

After introducing the absolute power theory, some tasks of the Leader, which are stated in Principle 110 of the Constitution, are discussed below.

(B) Leader's tasks under Iran's Constitution

Iran's Constitution defines a number of powers of the Leader. This could be indicating that the powers of the Leader are restricted to what is stated in the Constitution, but this is not the case. The powers and duties of the Leader that are listed in the Constitution do not constitute an exhaustive list and are regarded to be examples of the Leader's powers and duties.⁶⁷ Therefore, on the basis of Principle 57 of Iran's Constitution, the leader's power is indeed absolute.

Most of the powers and duties of the Leader are stated in Principle 110 of Iran's Constitution.⁶⁸ The most important ones for the purpose of this dissertation include:

⁶⁷ For instance, see Principle 110 of Iran's Constitution which includes eleven sections on Leader's powers and duties.

⁶⁸ The Leader's powers and duties under the Constitution are quite extensive and extend to legislative, executive and judicial powers. These go beyond the scope of this dissertation and have been described elsewhere: see Musavi Khomeini (2002). There are also other tasks that the Leader performs. These include: the Islamic Revolution Mostazafan (the oppressed) Foundation (established on 28 February 1979 by Iran's previous Leader Imam Khomeini); the Imam Khomeini Relief Foundation (IKRF)(established on 5 March 1979 by Iran's previous Leader Imam Khomeini); the Foundation of Martyrs and Veterans Affairs (established on 12 March 1980 by Iran's previous Leader Imam Khomeini); the Islamic Propagation Organization (established on 1980 by Iran's previous Leader Imam Khomeini); the Islamic Culture and Relations Organization (established by Iran's current Leader in 1995); the Imam Khomeini's Executive Committee (on Principle 49 of Iran's Constitution (1989)); the Policy Council of Friday Prayer Imams (which on 12 March 1993 substituted the Central Council of Friday Prayer Imams established by the founder of Islamic Revolution of

- 1) Long-term strategy making and supervising compliance with Principle 110;
- 2) Settlement of Important Problems;
- 3) Resolving Controversies among the Executive, Legislature and Judiciary.

Each is briefly presented in turn.

- Long-term strategy making and supervising compliance with Principle 110;

The first task of the Leader described in the Constitution is strategy making and supervision of its implementation. Section (1) of Iran's Constitution Principle 110 states that:

Determining the overall politics of the Islamic Republic system of Iran after consultation with the National Expediency Council.⁶⁹

For accession to the WTO, Iran needs to improve its strategies regarding the national economy, trade and business. Also it needs to amend some of its legislation and regulations or adopt new ones to make its 'laws, legislation and administrative procedures'⁷⁰ consistent with the WTO agreements. Therefore, amending and adopting new strategies will be helpful to achieve these goals. To draft the required strategies, general lists of important topics have been referred to the National Expediency Council by the Leader. There are Council committees that conduct the necessary studies to draft long-term strategies. These draft strategies should be approved by the National Expediency Council and are subsequently submitted to the Leader. Based on the draft strategies approved by the National Expediency Council and after consulting additional experts, the Leader can approve these strategies or send them back to the Council for re-examination and reform. Strategies approved

Iran); appointing the Head of Astan Quds Razavi (Holy Shrine of Imam Reza affairs); appointing the Head of the Endowments and Charity Affairs Organization; the High Council of Quran (established on 5 October 1991 by Iran's current Leader); literacy Movement Organization of Iran (established by the previous Iran's Leader on 28 December 1979). The Leader has also permanent delegation offices in universities, the armed forces, pilgrimage, etc.

⁶⁹ Section (1) of Iran's Constitution Principle 110.

⁷⁰ Article XVI:4 of the WTO Agreement.

by the Leader will be sent to the heads of Executive, Legislature and Judiciary for implementation.⁷¹

The Leader has to supervise whether the approved long-term strategies are fully implemented. This is stipulated in Section (2) of Iran's Constitution Principle 110:

supervising the proper implementation of the general policies of the system.⁷²

It bears mentioning that pursuant to the last part of Principle 110 of the Constitution, the powers and duties of the Leader can be referred to another person. This person can be a legal or a natural person. Principle 110 states:

The leader can transfer some of his duties and authorities to another person.⁷³

In 1998 the Leader has referred the task of supervising the implementation of long-term strategies to the National Expediency Council.⁷⁴ Because the National Expediency Council has been involved in the drafting process of the strategy, it is expected to possess a sufficient understanding of the policies' objective and purpose and enforcement capacity to ensure the effective implementation of the strategies. Subsequently the National Expediency Council sends a Compliance report analyzing the effectiveness of the strategy to the Leader. The Leader takes the final decision on whether there has been full compliance or not and whether the strategy was successful. Section (2) of the Principle 110 of the Constitution specifies that the final decision of supervision rests with the Leader and can therefore not be delegated.

- Settlement of Important Problems

The second task to be performed by the Leader is to take charge in case of very important problems arising from within the legal system, including

⁷¹ For further information, see the relevant part in section 3.5.5. (National Expediency Council).

⁷² Section (2) of Iran's Constitution Principle 110.

⁷³ Principle 110 of Iran's Constitution.

⁷⁴ The National Expediency Council website at: <http://maslahat.ir>, last visited on 1-10-2016.

problems relating to constitutional rules that other authorities are unable to solve. This task thus constitutes a safeguard clause to ensure that a solution can be found, so as to avert any detriment to the country as a whole. Section (8) of Principle 110 states:

Resolving issues in the system that cannot be settled by ordinary means through the Expediency Council.⁷⁵

This provision can, for example, be relied upon in cases where the country needs something which contravenes the Constitution and Islamic principles but that cannot be attained given the constitutional tasks of the Parliament and other constitutional authorities or because political agreements cannot be reached. On the basis of this provision, the Leader can apply his wisdom to overcome such a situation. In accordance with the theory of *Velayate Faqih* and Principle 5 of the Constitution, the Leader is therefore empowered to accept solutions even if they are inconsistent with other principles of the Constitution. This constitutional flexibility may constitute a potential solution to the legal conflicts between Iran's constitution and the WTO agreements which will be explored in later chapters of this dissertation (discussed in chapter seven).

The Leader can therefore play an important role in resolving constitutional problems, potentially in a more timely and expedient way than through reliance upon constitutional amendments. The Leader can also delegate this task to the National Expediency Council (Section (8) of Principle 110).⁷⁶ In case of delegation of this task to the National Expediency Council, a committee shall examine the problem and propose the solution to the National Expediency Council for approval. The Leader reviews the Council's proposal. In case the Leader accepts it, the relevant authorities will be notified for implementation.

- Resolving Controversies among the Executive, Legislature and Judiciary

⁷⁵ Section (8) of Iran's Constitution Principle 110.

⁷⁶ The National Expediency Council is composed of natural and legal persons who are appointed by the Leader. For instance, some members of the Guardian Council, Parliament, Government, and Judiciary are members of the Council. A more detailed discussion is introduced in the relevant section on the National Expediency Council.

The third task of the Leader is to arbitrate in case of disputes arising between the Government, the Parliament and the Judiciary. Section (7) of Principle 110 provides:

Coordinating the relationship among the three branches of the Government and resolving any conflict among them.⁷⁷

This Section of the Constitution provides a solution for those disputes which are not very grave. It can for instance be employed in situations where new legislation is not needed to resolve the issue but where the problem is still serious enough to impede the working relationship between the Parliament, the Government and or the Judiciary. In other words, sometimes there might be some controversy based on different legal interpretations which cannot be resolved through the legal clarifications of the Guardian Council. In these circumstances the Leader can intervene and arbitrate between the various positions to resolve the problem.

For instance, on 25 July 2011, due to a number of controversies⁷⁸ which arose between the Government and the Parliament and also between the Government and the Judiciary, the 'High Board of Dispute Settlement' was established by the Leader to examine the issues and to suggest the best solution to the Leader. This 'High Board of Dispute Settlement' is composed of in total five members and chaired by a former head of the Judiciary; board members are appointed for five years.⁷⁹ High Board members are former judges, legal experts or members of the Guardian Council, members of Parliament, etc. Section (7) of Principle 110 of the Constitution constitutes the legal basis for the creation of this Board.

⁷⁷ Section (7) of Iran's Constitution Principle 110.

⁷⁸ For instance, the controversies mostly were about the supervision of the Head of the Parliament over Government's approvals (to be consistent with Parliament's approvals), or the extent of the president's power to supervise the compliance of the Constitution by the Parliament and the courts. For instance, see the letter of the Head of the Judiciary to the president at: <http://www.mehrnews.com/detail/News/1727575>, last visited on 1-10-2016.

⁷⁹ The Leader's website, <http://farsi.khamenei.ir/message-content?id=16782>, last visited on 1-10-2016.

A question that can be raised is what is the difference between the dispute settlement method of Section (8) and that of Section (7) of Iran's Constitution Principle 110?

According to the issues which have been referred to the National Expediency Council and the High Board of Dispute Settlement, a criterion can be identified to differentiate between the use of Section (8) and Section (7) of Principle 110. When a dispute is raised and the solution can be in conflict with the rules of the Constitution, Section (8) is relied upon; the conflict is sent to the National Expediency Council to be examined and the result should be submitted to the Leader for the final solution. It bears mentioning that the Leader's solution can be in conflict with the constitutional rules.

However, when a dispute is raised and the solution would be consistent with the constitutional rules, the 'conventional method' of Section (7) of Principle 110 is relied upon. In this case, the issue is referred to the High Board of Dispute Settlement to be resolved. The High Board should examine the issue and submit its advice to the Leader and the final decision is taken by the Leader. Conflicts handled by the High Board of Dispute Settlement under Section (7) are in conformity with the Constitution and clarify the interpretation of the Constitution. This was for example the case in a dispute that arose between the Government and the Parliament due to a lacuna in the Constitution relating to a conflict between the powers and duties of the Executive and the Legislature. The solution of this conflict thus clarified the Constitution and thereby filled the gap in the Constitution.

By contrast, conflicts that potentially are in conflict with the Constitution fall under Section (8) and cannot be resolved via the 'conventional methods' under Section (7), because the High Board of Dispute Settlement cannot propose solutions that contravene the Constitution.⁸⁰

However, the disputes which are sent to the National Expediency Council are problems which cannot be resolved through the 'conventional methods' because the result would be in conflict with the constitutional rules and the Parliament, for example, cannot approve them.

⁸⁰ Under Principle 4 of Iran's Constitution, all laws and regulations shall not be in conflict with Islamic rules.

Another difference between the dispute settlement method of Principle 110 Section (7) and the one of Section (8) is that the resolution under Section (7) should result in a balance of powers. In other words, one of duties of the Leader is to strike a balance between the Legislature, Executive and the Judiciary. This duty forms the final solution of any disputes raised under the Section (7) of Principle 110 of the Constitution. A detailed discussion on this subject is beyond the limited scope of this dissertation.

(C) Leader's responsibilities under Iran's Constitution

In addition to the above-mentioned powers and duties, the Constitution attributes a number of responsibilities to the Leader. These will be shortly introduced below in order to shed some light upon the Leader's position in Iran's legal system.

Under Iran's Constitution there are two kinds of responsibilities undertaken by the Leader: general and particular responsibilities.

- General Responsibility

The general responsibility means that the Leader has the same responsibility as other people of the country. In other words, if the Leader performs a civil or criminal wrong, he should be held responsible for that. The last sentence of Principle 107 of Iran's Constitution states that:

Before the law, the leader is equal to other people in the country.⁸¹

On the basis of the above-mentioned rule of Iran's Constitution in Principle 107, if the Leader engages in a crime, his responsibility cannot be ignored on the basis that he is the Leader and he, for example, has appointed the Head of the Judiciary and the legality and power of judges originate with him. According to Islamic rules and also the doctrine of *Velayate Faqih*, if the Leader engages in a crime which is in conflict with the Leader's qualification of justice, the Leader will lose the required competence to be the Leader because of lack of justice. In addition, he will be punished for the crime. This responsibility of the Leader under civil law is the same as under criminal law.

⁸¹ Principle 107 of Iran's Constitution.

However, a civil tort can be unintentional and, even though it results in liability, it does not impair the qualifications of the Leader.

It can be argued that this general responsibility can be in conflict with Principle 57 which gives absolute power to the Leader. However, it should be taken under consideration that the leader possesses the absolute power as far as he has not performed a wrong. If he performs a wrong, he will be disqualified due to the lack of the required qualification for being a *Faqih*. And if he is disqualified, he also loses the basic qualifications to be a Leader and, therefore, there will not be any absolute power for him.

- Particular Responsibility

The particular responsibilities of the Leader are derived from his particular position within Iran's Constitutional system. Under Iran's Constitutional rules, there are two kinds of particular responsibilities recognized for the Leader: financial responsibility and leadership responsibilities.

With regard to the Leader's financial responsibility, the assets of the people from high positions (including the Leader) and their families should be examined before and after the term of their office. This examination should be carried out by the Head of the Judiciary.⁸²

As to the leadership responsibility, after the Leader is elected his behavior is examined. During the time of this office, his actions and behavior must be compliant with the qualifications of the Leader stated in the relevant Principles of the Constitution. Principle 111 of Iran's Constitution states that whenever the Leader becomes incapable of fulfilling his constitutional duties, or loses one of the qualifications mentioned in Principles 5 and 109, or it becomes known that he did not possess some of the qualifications initially, he will be dismissed by the Assembly of Experts.

⁸² Principle 142 of Iran's Constitution states: 'The assets of the Leader, the President, the deputies to the President, and ministers, as well as those of their spouses and offspring, are to be examined before and after their term of office by the head of the Judiciary, in order to ensure they have not increased in a fashion contrary to law'.

3.5.2. Assembly of Experts

After discussing the legal position of the Leader and his tasks under Iran's Constitution, the Assembly of Experts which elects the Leader and supervises the Leader's actions is introduced.

The Assembly of Experts consists of 99 experts.⁸³ Any Iranian person, irrespective of gender can be elected provided that he/she is of age. The Assembly members are directly elected for eight years through an election by the people. Therefore, the Leader is indirectly elected by the people.

Assembly members should be experts in the relevant fields in order to be able to assess whether candidates for the position of Leader possess the necessary qualifications. This is checked (sometimes through exams) by the Guardian Council. The basic level of necessary qualifications is to have 'knowledge' and 'justice'. The term 'knowledge' here refers to a professional level of ability, as stated in Principle 109 of Iran's Constitution, to perform the functions as a religious leader in different fields of *Fiqh* (Islamic sources). There are also other qualifications stated in Principles 5 and 109 of Iran's Constitution, such as having *Ijtihad* (Islamic jurisprudence). The qualification of assembly candidates is assessed by the Guardian Council, usually on the basis of written or oral examinations.⁸⁴

There are some powers and duties defined in Iran's Constitution for the Assembly of Experts. These powers and duties are as follows:

- Electing the Leader (Principle 107);
- Dismissal of the Leader (Principle 111);
- Supervising the Leader (Principle 111);
- Participation in the revision of the Constitution (Principle 177).

Under the Internal Regulation of the Assembly of Experts, there are six permanent committees to perform the duties referred to the Assembly by the

⁸³ The Assembly of Experts had 86 members. However, recently due to an increase in Iran's population, 13 members are added. Therefore, the Assembly has 99 members now.

⁸⁴ Article 3, paragraph B of the Assembly of Experts Election Act [قانون انتخابات مجلس خبرگان, (1 October 1982), (Translation S.A).

Constitution. The committees which are composed of the members of the Assembly are as follows:

1. The Research Committee (Principle 111 of the Constitution);
2. Committee of Regulation Concerning Principle 108;
3. The Committee of Principles 107 and 109 of the Constitution;
4. The Committee to Study the Ways on Preservation and Protection of *Velayate Faqih*;
5. The Political-Social Committee;
6. The Financial and Administrative Affairs Committee;
7. Special Committee.

If the Leader is dismissed by the Assembly of Experts, the temporary Leadership Council performs the tasks of the Leader until a new Leader is appointed.

3.5.3. Executive

In addition to the Leader and Assembly of Experts, there are other key constitutional institutions such as the Executive (Government) which can be also involved in Iran's adoption process of multilateral agreements. The Executive performs and manages the accession process negotiations and can also follow its own interpretation of the constitutional principles. It is introduced here by giving a general introduction.

3.5.3.1. General Introduction (Government)

After the Leader (discussed above), the President is the highest Executive authority in Iran (Principle 113⁸⁵). The Executive in Iran is, however, applied through the President and the Ministers. Principle 60 states:

The Executive power is exercised by the President of the Republic and the ministers, except in affairs that are directly delegated to the leadership by this law.⁸⁶

⁸⁵ Principle 113 of Iran's Constitution reads: 'After the leadership, the President of the Republic is the highest official of the country'.

⁸⁶ Principle 60 of Iran's Constitution.

The President is directly elected by the people for four years. He can be re-elected after the first four-year-period. There are specific qualifications stated in Principle 115 of Iran's Constitution⁸⁷ and the relevant legislation which shall be met by the presidential candidates. The Guardian Council is given the task to examine if the candidates possess these qualifications.⁸⁸ After the President is elected he nominates his ministers and introduces them to the Parliament. After examining each minister's work plan, the Parliament can issue its vote of confidence to the ministers.⁸⁹

The President has been endowed by the Constitution and other laws (such as the 'Defining President's Duties, Powers and Responsibilities Act' (Approved by the Parliament on 13 November 1986)) with specific powers and duties relating to the Constitution, the Executive and the Legislature. A detailed discussion of all tasks of the President is beyond the limited scope of this research. However, one of his powers, which is the responsibility to implement the Constitution, is introduced below, and some other tasks, as far as are relevant to the WTO accession, have been briefly discussed under the relevant subsection.

Concerning the powers and duties relating to the Constitution, the most important task of the President is to safeguard that the Constitution is being abided by. There is therefore a *prima facie* overlap of responsibilities between the President and the Guardian Council (discussed below). According to Principle 113 of Iran's Constitution, the responsibility of the Executive in the

⁸⁷ Principle 115 states: 'The President of the Republic must be elected from among the religious and political elite who meet the following qualifications: Iranian origin, Iranian nationality, administrative leadership, clear past record, honesty and piety, believing in the fundamentals of the Islamic Republic of Iran and the official religion of the country.'

⁸⁸ In Iran's presidential election in June 2013, 686 individuals registered in the Interior Ministry, among which 8 candidates were announced by the Guardian Council that possessed the necessary qualifications. For further information see the website of Iran's Interior Ministry at <http://www.moi.ir>, last visited on 1-10-2016.

⁸⁹ Principle 87 of Iran's Constitution states: 'The President of the Republic must obtain a vote of confidence from the Assembly for the Board of Ministers after it is formed and before any undertakings. On important or disputable matters, the president during his term can also request a vote of confidence from the Assembly for the Board of Ministers.'

supervision of compliance of the Constitution belongs to the President.⁹⁰ This responsibility was further elaborated upon in Articles 13 to 16 of Defining President's Duties, Powers and Responsibilities Act (13 November 1986). Moreover, in December 1997, a 'Board on Supervision over Implementation of the Constitution' was formed in the President's office to support the realization of this task. Due to legal concerns regarding the separation of powers between the Legislature and the Executive, the working of this board was later suspended until March 2012. However, on 2 July 2012, an interpretation was issued by the Guardian Council which announced that the 'Board on Supervision over Implementation of the Constitution' was illegal.⁹¹ The main reason was the inconsistency of the tasks given to the mentioned Board with the separation of powers rule which is stated in Principle 57 of the Constitution.⁹²

Prior to this interpretation of the Guardian Council, a leading constitutional law expert, analyzed the responsibilities of the President and the Guardian Council. In his work, Hashemi differentiated between two types of compliance supervision activities: legislative supervision and executive supervision. The author theorized that the President is charged with supervising the Executive, while the legislative supervision, safeguarding that legislation is compliant with the Iranian Constitution and Islamic rules, is conducted by the Guardian Council. Following Hashemi, the positions of the President and the Guardian Council would be reconcilable and the *prima facie* overlap between the President and the Guardian Council would therefore not be problematic.

Also, other authors seem to support this position. Amid Zanjani⁹³ for example suggests that if the President establishes that a regulation of the

⁹⁰ S.M. Hashemi, *The Constitutional Law of Islamic Republic of Iran* [حقوق اساسی جمهوری اسلامی ایران] 23, third ed., vol. 2 (Mizan Publications, 2012), p. 288.

⁹¹ Interpretation no. 91/30/47142 which was issued on 2 July 2012, for further information see the website of the Guardian Council at: shora-gc.ir, last visited on 01-07-2013, (Translation S.A).

⁹² Principle 57 of the Constitution states: 'The governing powers in the Islamic Republic of Iran consist of the Legislature, the Executive, and the Judiciary...These powers are independent of one another.'

⁹³ Abbass Ali Amid Zanjani was a prominent professor of public law and a lecturer of Tehran University who recently passed away.

Executive is non-compliant with the Constitution, he can officially declare it thus and stop its implementation control without undermining the Separation of Powers.

According to this line of reasoning, the President cannot stop the implementation of (parliamentary) legislation⁹⁴ that is in conflict with the Constitution.⁹⁵

After a general introduction to the Executive and its tasks, it bears mentioning that the Government also plays an important role in Iran's treaty adoption process. This role will be introduced in section 3.6.2.

After the Leader and the Executive, the legislature also plays a key role in Iran's constitutional institutional system which is presented below.

3.5.4. Legislature

To introduce Iran's constitutional institutions and division of power, the Leader and Executive were presented. This section briefly introduces the Legislature.

The Legislature in Iran includes two organizations, firstly the 'Islamic Consultative Assembly' and secondly the Guardian Council. While the former is the Iranian Parliament, the latter checks the constitutionality of the parliamentary approvals. This section concisely presents tasks of the Parliament (1) and the Guardian Council (2) that are relevant to this dissertation.

⁹⁴ There are three kinds of bills which can be submitted to the Parliament to be discussed and adopted: governmental bills, parliamentary bills, and bills from the High Council of Provinces. The Parliament can adopt legislation even if the President has not proposed it or he does not support it. If after the legislation is adopted, the President does not sign it, after 15 days it will be published and will be binding. (Article 1 of Iran's Civil Code). The parliamentary bills can include all subjects including the ones under control of the Government.

⁹⁵ For more information on this task of the president see A. Amid Zanjani, *Generalities of Constitutional Law of Islamic Republic of Iran* [کلیات حقوق اساسی جمهوری اسلامی ایران], Third ed. (Majd Publications, 2009), pp. 125-126.

3.5.4.1. *Parliament*

Iran's Islamic Consultative Assembly is Iran's Parliament. Its members are directly elected by the people for four years. It has 290 members including representatives from ethnic or religious minorities (Principle 64 of the Constitution).

The Parliament receives its legislative powers on the basis of Principle 58 of Iran's Constitution. Principle 58 of the Constitution states:

The Legislature operates through the Islamic Consultative Assembly that consists of the elected representatives of the people. Its legislation, after going through stages that will be specified in the following principles, is communicated for enforcement to the Executive and Judiciary.⁹⁶

Iran's Islamic Consultative Assembly has tasks similar to those of parliaments in other countries. More specifically it engages in law making, interpretation of legislation and supervising; each is discussed in turn.

(A) Law making

Under Principles 58 and 71, the Parliament can formulate law on all matters provided the consistency of the law with constitutional and Islamic rules is safeguarded. To this effect Principle 71 prescribes:

The Islamic Consultative Assembly can legislate laws on all issues within the limits set by the Constitution.⁹⁷

In general, legislation can be initiated by the Government (Principle 74 of the Constitution), by at least 15 Members of Parliament (Principle 74 of the Constitution) or by the Supreme Council of Provinces (Principle 102 of the Constitution).⁹⁸

⁹⁶ Principle 58 of Iran's Constitution.

⁹⁷ Principle 71 of Iran's Constitution.

⁹⁸ For further information see the website of the Parliament, <http://rc.majlis.ir>, last visited on 1-10-2016.

Bills should first be discussed and approved in the relevant committee(s).⁹⁹ The report of the committee(s) on the bill as a whole should be discussed and approved in the formal session of the Parliament.¹⁰⁰ If it is approved then it will be sent back to the committee(s) to discuss the details. The report of the committee(s) should be submitted to the formal session of the Parliament and discussed and approved there.¹⁰¹ If the bill is approved it should be submitted to the Guardian Council to check whether it is consistent with the constitutional and Islamic rules. If the Guardian Council finds an inconsistency, the approval should be sent back to the Parliament for review and to remove the inconsistency. The Guardian Council's decision should be discussed in the original committee of the Parliament and the report of the committee will be sent to the formal session of the Parliament.¹⁰² The approval of the Parliament will be sent again to the Guardian Council.¹⁰³

If under Guardian Council's view, the inconsistency is not removed, the approval will be sent back again to the Parliament. If the Parliament insists on its approval and does not implement the Guardian Council's view, the approval can be sent by the Head of the Parliament to the National Expediency Council to be discussed and resolved there under Principle 112 of the Constitution.¹⁰⁴

In case of bilateral or multilateral agreements and treaties, special rules apply. These are of direct relevance in the context of the WTO and therefore discussed shortly in section 3.6.4 and then in detail in chapter four.¹⁰⁵

⁹⁹ Article 144 of Rules of Procedure of the Parliament [آیین نامه داخلی مجلس شورای اسلامی], <http://en.parliran.ir/eng/en/The%20Rules%20of%20Procedure>, last visited on 15-3-2017.

¹⁰⁰ Article 151 of Rules of Procedure of the Parliament.

¹⁰¹ Article 152 of Rules of Procedure of the Parliament.

¹⁰² Article 202 of Rules of Procedure of the Parliament.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ See chapter four, section 4.3.4. (Who Checks the Constitutionality in Accession Process?), and section 4.3.5. (The Role of the National Expediency Council in the Accession Process).

(B) Interpretation of laws

Principle 73 of Iran's Constitution confers the right on the Parliament to clarify and interpret laws. Principle 73 states:

The clarification and interpretation of ordinary laws falls within the competence of the Islamic Consultative Assembly. The intent of this Principle does not prevent the interpretations that judges may make in the course of cassation.¹⁰⁶

This task is perhaps a special feature of the Iranian Constitution as it attributes judiciary tasks to the Legislature in the sense that its legal interpretations are binding upon administration and lower national courts. It does not, however, bind courts of appeal. In its task the Parliament is assisted by a Parliamentary office that issues advisory opinions on the laws to clarify the meaning of legislation.

In those cases where a legal clarification is insufficient, the Parliament can issue a legal interpretation. To issue a legal interpretation, the matter will first be discussed at the relevant committee. The resulting committee report will then be discussed and voted upon in a formal session of the Parliament.¹⁰⁷

(C) Supervisory tasks of the Parliament

Principle 76 of Iran's Constitution has recognized a very general and unlimited supervision power for the Islamic Consultative Assembly. Principle 76 states:

The Islamic Consultative Assembly has the right to investigate and evaluate all the affairs of the nation.¹⁰⁸

This task is defined in detail in other principles of the Constitution. Hashemi, who is the most known constitutional law expert in Iran, has categorised the supervisory tasks into five supervisory tasks: establishing supervision; political supervision; financial supervision, informative supervision, and approbation supervision.

¹⁰⁶ Principle 73 of Iran's Constitution.

¹⁰⁷ Article 189 of Rules of Procedure of the Parliament.

¹⁰⁸ Principle 76 of Iran's Constitution.

The 'establishing supervision' is executed by the Parliament when ministers are appointed. The President suggests candidates to the Parliament to be appointed as ministers. The Parliament examines the candidates' plans and votes on the appointment of the proposed candidates.¹⁰⁹

Political supervision is exerted by the Parliament by impeaching ministers and the President (Principle 89). An impeachment of the President must also be approved by the Leader (Principle 110 (10)).

The Parliament executes the 'financial supervision' by approving (Principle 52 of the Constitution) and supervising the compliance with the annual budget (Principles 54 and 55 of the Constitution).¹¹⁰ The latter task is undertaken by the 'National Accounting Organization', which is one of the parliamentary institutions and staffed by civil servants.

The 'approbation supervision' entails that the Parliament is the final decision maker in specific areas without being subject to any other institution except for the cases which are mentioned in the constitution. The areas where the Parliament is the ultimate decision include *inter alia*:

- Approving the referral of public and state property disputes with non-Iranians to non-judicial dispute settlement systems (Principle 139 of the Constitution);
- Approving accession to bilateral and multilateral agreements and treaties (Principles 77 and 125 of the Constitution);
- Approving the taking and giving of loans or grants-in-aid, domestic and foreign, by the government (Principle 80 of the Constitution);
- Approving the employment of foreign experts (Principle 82 of the Constitution);
- Approving the transferring of Government's buildings and properties which form part of the national heritage (Principle 83 of the Constitution).

The Parliament also executes an 'informative supervision'. This implies that the Parliament can inform the courts about suspected violations by approving and sending a report to the Judiciary.

¹⁰⁹ For further information see Hashemi (2012), pp. 160-165.

¹¹⁰ For further information see *ibid*, pp. 209-211.

Under Principle 90 of the Constitution, for example, a Parliamentary committee can be formed to examine the people's complaints against the Legislature, Judiciary and Executive.¹¹¹

Similarly, the Parliament can ask questions to the Ministers (Principle 88) or to the President (under Principle 88 provided that at least one quarter of the house is in favor).¹¹²

The Parliament can also investigate all matters of the country.¹¹³ If any violation is found, a report can also be sent to the courts.¹¹⁴

After the tasks of the Parliament are introduced, there is an important question with regard to the constitutionality of Parliament's approvals to be briefly discussed below.

An important question which can arise regarding the Parliament's tasks is whether the Parliament can check the constitutionality with regard to its approvals. This can be helpful to find inconsistencies with the Constitution and to have them removed them by the Parliament before being sent to the Guardian Council. This is also what is expected to be examined by the Parliament with regard to Iran's protocol of accession to the WTO. This constitutionality check is discussed in section 3.6.3.

After the Parliament, another institution which has a key role in the Legislature is the Guardian Council.

3.5.4.2. *Guardian Council*

The Guardian Council is a constitutional body charged with supervising the adherence to the constitutional rules as well as Islamic rules.¹¹⁵ The Council is

¹¹¹ For further information see *ibid*, pp. 165-172.

¹¹² For further information see *ibid*, pp. 173-176.

¹¹³ For further information see *ibid*, pp. 176-179.

¹¹⁴ Article 216 of the Rules of Procedure of the Parliament.

¹¹⁵ A similar constitutional body already existed in the Constitution of 1905. Principle 2 of the Supplement of 1905 Constitution of Iran had established a Committee of Islamic Experts to examine the constitutionality of the approvals of the Parliament. Under this Principle, if the approvals were inconsistent with Islamic rules, the Committee could reject them and the decision of the Committee was binding and final. The Parliament appointed five members from a list of 20 Islam experts.

composed of six law experts and six Islamic law experts, six of which are proposed by the Judiciary to the Parliament to be appointed for six years. The other six members should be Islamic law experts and should be appointed for six years by the Leader. Under Iran's Constitution, the interpretation of the Constitution is the prerogative of the Guardian Council.¹¹⁶

Principle 91 of Iran's Constitution states:

An assembly named the Guardian Council is established in order to protect the commands of Islam, and the Constitution from discord with the proceedings of the Islamic Consultative Assembly. The Guardian Council has the following composition:

1. Six just Islamic jurists who are conscious of the issues and needs of the time. These are selected by the Leader.
2. Six legal scholars (*Hoquqdan*), specialized in different fields of law, from among Muslim jurists who are presented by the head of the Judiciary to the Islamic Consultative Assembly and are selected by the vote of the Assembly.¹¹⁷

Because the tasks of safeguarding the Constitution is usually performed by a constitutional court (this is for example the case in France) or by a supreme court (as is the case in United States), it might be assumed that the Guardian Council is a Court.¹¹⁸ Although the Guardian Council is composed of law experts and under Islamic rules, an Islamic law expert (*Faqih*) also possesses the required qualifications to be a competent judge¹¹⁹ and the members of the Guardian Council all have the necessary qualifications to be judges, the Council is not a court. This is due to the fact that the Council does not follow the specific rules of proceedings that are stated in the relevant court rules in Iran. Under Iran's Constitution, the Council's procedural rules should be

¹¹⁶ The National Expediency Council has, however, the power to resolve the disputes between the constitutional institutions but does not interpret the Constitution.

¹¹⁷ Principle 91 of Iran's Constitution.

¹¹⁸ S.M.M. Ghamami, Fundamental Rights of Islamic Republic of Iran [حقوق اساسی جمهوری اسلامی ایران] (The Center for Islamic Revolution Documents Publications, 2011), pp. 503-504.

¹¹⁹ A.S.R. Khomeini, Tahrir Al Vasileh [تحریر الوسیله], trans. SMB Mousavi Hamdedani, 4 vols., vol. 4 (Darol Elm, 2008), p. 404.

approved by it in the form of internal regulations. In addition, Iran's constitutional system does not recognize the institutions which do not have all the qualifications as defined by the relevant laws to be a court. In other words, the Guardian Council does not fit into the framework of the definition for courts in Iran.

The Guardian Council has four tasks which are stated in Iran's Constitution. The Council (1) supervises laws and regulations, (2) interprets the Constitution, (3) supervises elections and referenda and (4) participates in other constitutional institutions. Its tasks are thus mostly related to the supervision of the compliance with the constitutional rules and Islamic norms.

1) The task of supervision over the consistency of laws includes two parts: safeguarding the constitutional rules, which is a task that should be performed by all members of the Council; and safeguarding the Islamic rules which is a task that should be performed just by those six members of the Council who are Islamic experts. To facilitate the Council's tasks, the Parliament is obliged by Principle 94¹²⁰ of the Iranian Constitution to send all approvals to the Guardian Council for examination. This obligation includes secular and Islamic matters. However, the term: 'all approvals' used in Principle 94 cannot include all approvals of the Parliament. The Parliament can issue different kinds of approvals, among which some are merely decisions, such as the decision on appointing the six members of the Guardian Council, which logically cannot be sent to the Guardian Council. Similarly, decisions on internal affairs of the Parliament are not sent to the Guardian Council.

If an approval by the Parliament or Government is inconsistent with the Constitution, it cannot attain legal value in Iran's legal system. The constitutionality is checked within 10 days (extendable to up to 20 days) by the Council as prescribed in Principle 96 of Iran's Constitution:

¹²⁰ Principle 94 of Iran's Constitution states: 'All legislation of the Islamic Consultative Assembly must be sent to the Guardian Council, which must evaluate it within ten days to assure its compatibility with the constitution and the Islamic criteria. The Council must return the legislation to the Assembly for reconsideration if it is incompatible; otherwise, the legislation can be executed.'

The majority of the jurisprudents in the Guardian Council shall determine the compatibility of the proceedings of the Islamic Consultative Assembly with the commands of Islam. A majority of all the members of the Guardian Council shall determine the compatibility of the proceedings with the constitution.¹²¹

Therefore, the Council Members who are not *Faqih* do not have any role in relation to the voting on the constitutionality of Islamic rules.

In addition to the Guardian Council's task of supervision over the consistency of laws, there is another important task which can affect the adoption process of an international treaty in Iran. This task is presented below.

2) Interpreting the Constitution is one of the most important tasks of the Guardian Council. To issue an interpretation of the Constitution needs a three-fourths majority of the members of the Guardian Council.¹²² If the three-fourths criteria cannot be met, but at least the majority of its members share a common position, the Guardian Council's opinion can be issued as an advisory opinion which is non-binding.¹²³

Under Article 18 of Internal Regulation of the Guardian Council, an interpretation of the Constitution can be requested by the Leader, President, Head of the Parliament, Head of the Judiciary, or a Guardian Council member.

3) Under Principle 99 of Iran's Constitution, the Guardian Council has the responsibility to supervise the elections such as: Assembly of Experts election; Presidential election; Parliament election; and referenda¹²⁴. Public Council elections are not supervised by the Guardian Council. This task is referred to the Parliament.

4) Participation in other constitutional institutions

¹²¹ Principle 96 of Iran's Constitution.

¹²² Principle 98 of Iran's Constitution.

¹²³ See Hashemi (2012), pp. 251-256.

¹²⁴ See Principle 99 of Iran's Constitution.

It is worth mentioning that under Iran's Constitution, the Guardian Council should participate in several formal meetings and also be an official member of various constitutional institutions.¹²⁵

Under Iran's Constitution, the Guardian Council examines the Parliament's approval and if it finds any inconsistency with the Constitution, the approval is sent back to the Parliament to remove the inconsistency. If the Parliament does not remove the inconsistency, this can be seen as a conflict between the Parliament and the Guardian Council to the National Expediency Council to be resolved there. The Guardian Council thus plays a very important role in safeguarding the constitutionality of parliamentary decisions.

The National Expediency Council, which resolves the disputes between the Parliament and the Guardian Council, is introduced below.

3.5.5. National Expediency Council

Another important constitutional institution which, due to its relevant role to this research needs to be introduced, is the National Expediency Council. This Council as a dispute settlement institution (between the Parliament and the Guardian Council) and a national strategy maker is defined in chapter eight of Iran's Constitution, which is not a part of the Executive, Legislature or the Judiciary. Chapter eight of Iran's Constitution defines the powers and duties of the Leader. The National Expediency Council works under the Leader's supervision and in several cases as his adviser. There is a Principle in Iran's Constitution which states that the Parliament cannot approve laws that are inconsistent with Islamic or constitutional rules.¹²⁶ This Principle also

¹²⁵ Some of which are: Participation in Parliament's sessions in discussions on urgent bills (Principle 97 of Iran's Constitution); Participation in Parliament's closed sessions (Principle 69 of Iran's Constitution); President's oath-taking session in the Parliament (Principle 121 of Iran's Constitution); Participation of one of the Islam experts of the Guardian Council in the temporary Council of Leadership (Principle 111 of Iran's Constitution); Participation of all members of the Guardian Council in the Revision Council of the Constitution (Principle 177 of Iran's Constitution); Participation of the six Islamic experts of the Guardian Council in some sessions of the National Expediency Council (on resolving the disputes between the Parliament and the Guardian Council under Principle 112 of Iran's Constitution).

¹²⁶ Principle 72 of Iran's Constitution states: 'The Islamic Consultative Assembly cannot legislate laws that contradict the canons and principles of the official religion of the

refers the task of comparing Parliamentary approvals with Islamic and constitutional rules to the Guardian Council.

As discussed, in case of an inconsistency between a Parliament's approval and Islamic or constitutional rules, the approval should be sent back to the Parliament by the Guardian Council so that it can be brought into consistency.¹²⁷ Even though the Parliament should be seeking to approve what is necessary for the people of the country, the Guardian Council cannot be blamed for rejecting a Parliament's approval if it includes inconsistencies.

This section presents some general information on the Council, such as its tasks as follows.

To have a better understanding of the legal position of the National Expediency Council among Iran's constitutional institutions, powers and duties of the Council are briefly discussed in this section.

Powers and duties of the National Expediency Council

The main aim in establishing the Council was to act as a superior and independent arbitral tribunal to resolve the disputes between the Parliament and the Guardian Council. This Council was expected to recognize the necessities and approve the required legislation. Later, some other tasks were also referred to the Council by the Constitution and the Leader. The Council is addressed in its Internal Regulation as a Supreme Consultative Board for the Leader.

The powers and duties of the National Expediency Council as stated in the Constitution or mentioned in the Leader's decrees are drafting general policies to be approved and enforced by the Leader (1), supervision of the proper implementation of the general policies (2), referrals received from the Leader (3). Two tasks which are not discussed in this section, but later in the

country or the constitution. The Guardian Council is responsible for the evaluation of this matter, in accordance with Principle 96.'

¹²⁷ Principle 94 of Iran's Constitution states: 'All legislation of the Islamic Consultative Assembly must be sent to the Guardian Council, which must evaluate it within ten days to assure its compatibility with the constitution and the Islamic criteria. The Council must return the legislation to the Assembly for reconsideration if it is incompatible; otherwise, the legislation can be executed.'

section 3.6.4, are those under Principle 110 (8) on disputes that cannot be resolved by conventional methods, and Principle 112 on constitutionality disputes.

(1) Drafting Iran's General Policies to be approved and enforced by the Leader

In almost all countries there are some institutions in place to undertake the required studies required to adopt long-term strategies. In Iran this task is referred to the Leader. Under Iran's Constitution, to adopt long-term strategies, the Leader consults with the National Expediency Council.

The most important policy drafted by the National Expediency Council and approved and enforced by the Leader is 'Iran's Outlook 1404 (2021) Document'. This document states a goal for Iran to be achieved in two decades until the year 2021. The stated goal in the document in general is as follows:

Iran is a developed country, with a first class economic, scientific and technological status in the region, with the Islamic and the revolutionary identification, inspiring in the world of Islam with the constructive and the effective interaction in international relationships.¹²⁸

To achieve some aims stated in the above-mentioned policy and especially to improve the efficiency of interaction in international relationships, Iran needs to put an end to its isolation from the international trade market. This can be done by becoming a Member of the World Trade Organization. Iran's accession to the WTO can give Iran the opportunity to access the WTO Members' markets and also to remove the bans and restrictions from Iran's market.

Another important general policy document which has been approved and enforced by the Leader is 'General Policies pertaining to Principle 44 of Iran's Constitution'.

¹²⁸ Iran's Outlook Document 1404 (2021), [اسناد چشم انداز بیست ساله نظام 1404], for the full text of the document see: <http://www.vision1404.ir/fa/News48.aspx>, last visited on 1-10-2016, (Translation S.A).

The mentioned policies are regarded as the start of a new process of privatization of governmental sectors in Iran. Paragraph A (1) of the document states:

The government does not have the right to new economic activity outside [those activities] listed in the beginning of Principle 44. It is required to transfer any kind of activity (including the continuation and profiting from pre-existing [business] activities) that is not covered by Principle 44 to the cooperative, private, or public non-governmental sectors, at the latest by the end of the 'Fourth 5-year Development Plan' (an annual decrease of 20% of activity).¹²⁹

This document was in a way revolutionary in the economic system of Iran due to the fact that the system was government based. To implement the policies stated in the mentioned document, some laws and regulations were also approved by the Parliament and the Government. It bears mentioning that, even though the necessary laws and regulations have been adopted to implement the privatization of Iran's economy, it is still a long way before the Government will reach such a goal. Therefore, although removing the inconsistencies between the mentioned strategy and Iran's laws and regulations was necessary, it could not bring the expected independence for the economy from the Government. This can be the same with regard to the accession and post accession of Iran to the WTO. In other words, a mere removal of the inconsistencies between the WTO agreements and Iran's laws, regulations and administrative procedures cannot improve the grave difficulties of Iran's economy to play a more efficient role in the multilateral trade system. Sustainable development can be achieved through gradual changes and amendment to the traditional domestic system.

(2) Supervision of the Proper Implementation of the General Policies

Under Section (2) of Principle 110 of Iran's Constitution, supervision of the full implementation of the general policies is one of the powers and duties of

¹²⁹ Paragraph A (1) of General Policies pertaining to Principle 44 of Iran's Constitution, [سیاست های کلی مربوط به اصل 44 قانون اساسی جمهوری اسلامی ایران], for the full text see: <http://irandataportal.syr.edu/the-general-policies-pertaining-to-principle-44-of-the-constitution-of-the-islamic-republic-of-iran>, last visited on 1-10-2016.

the Leader. In 1998, the Leader referred a part of this task to the National Expediency Council.

(3) Referrals received from the Leader

Under Principle 112 of Iran's Constitution, the National Expediency Council should perform the tasks which may be referred to it by the Leader. This part of the Principle 112 states:

... Or for consulting on affairs that the leadership will refer to the Expediency Council; or other duties that are mentioned in the constitution.¹³⁰

This means that the powers and duties of the National Expediency Council are not restricted to what is stated in the relevant Principles of the Constitution regarding the Council. In other words, the Leader can refer any kind of task to the Council to be accomplished there. This can include the powers and duties of the Leader which are stated in Principle 110 of the Constitution, which under the last sentence of that Principle can be referred to other persons. Furthermore, the Leader can also refer to the National Expediency Council matters that are not part of his constitutional powers and duties such as the executive, legislative or judicial tasks.

It bears mentioning that, to achieve the standard level required for accession to the WTO, the National Expediency Council can supervise the proper implementation of the relevant approved strategies in Iran.

There are two key tasks for the Council that, due to their direct relevance to Iran's accession to the WTO, are discussed separately under the section 3.6.4. Also, there are other tasks for the National Expediency Council stated in the Constitution which are beyond the limited scope of this dissertation.¹³¹

¹³⁰ Principle 112 of Iran's Constitution.

¹³¹ Other tasks such as: Consulting to the Leader on revision of the Constitution (Principle 177 of the Constitution); Membership in the Revision Council of the Constitution (Principle 177 of the Constitution); Appointing one of Guardian Council's Islamic experts to be the member of the temporary Council of Leadership (Principle 111 of the Constitution); Approving some of the Leader's tasks to be performed by the temporary Council of the Leadership (Principle 111 of the

In discussing the division of powers in Iran's constitutional system, to present a complete discussion, the Judiciary is introduced briefly.

3.5.6. Judiciary

The Judiciary is one of the cornerstones of Iran's constitutional system. Discussing this institution is important due to the importance of the specific definitions of judges and judgments under Iran's legal system. It is therefore introduced here by giving a general introduction to the Judiciary.

The court in Iran is similar to courts in other countries. However, there are also some differences that should be taken into consideration. As a general introduction, it can be helpful to recognize what it is meant by the term 'Judiciary' under Iran's Constitution.

The domestic dispute settlement system and criminal justice system of Iran, which is referred to as the 'Judiciary' in Iran's Constitution, is given various powers and duties. Under Principle 156 of Iran's Constitution, the powers and duties of the Judiciary are as follows:¹³²

1. Investigating and passing judgment on grievances, violations of rights, and complaints; the resolving of litigation; the settling of disputes; and the taking of all necessary decisions and measures in probate matters as the law may determine;
2. Restoring public rights and promoting justice and legitimate freedoms;
3. Supervising the proper enforcement of laws;
4. Uncovering crimes; prosecuting, punishing, and chastising criminals; and enacting the penalties and provisions of the Islamic penal code;
5. Taking suitable measures to prevent the occurrence of crime and to reform criminals.

The independence of the Judiciary from the Legislature and the Executive is emphasized in Principles 57 and 156 of the Constitution. Unlike some legal systems such as the United States where the judges can be appointed by the

Constitution); Appointing any of the temporary Council of Leadership alternative member in case of disability to perform the task (Principle 111 of the Constitution); Proposing how the decision to be taken by the temporary Council of Leadership in those issues stated in the Constitution (Principle 111 of the Constitution).

¹³² Principle 156 of Iran's Constitution.

President or the Parliament, and the court may not be totally independent from the executive and legislative authorities, in Iran, the independence of the court system is underlined in the Constitution. For instance, the head of the Judiciary is appointed by the Leader, and the president or the Parliament do not play any role in this regard.¹³³ Under Principle 157 of the Constitution, the head of Iran's court system should be 'a just *Mujtahid*'¹³⁴ (Islamic-law expert) who is 'well versed in judiciary affairs and possessing prudence and administrative abilities'.¹³⁵ The Head of the Judiciary is appointed for five years. Although there is no limit to the number of reappointments, so far in practice nobody has chaired the Judiciary for more than two periods (10 years).

Before the revision of the Constitution in 1989, the Judiciary was chaired by the Supreme Council of the Judiciary. The Council was composed of the Chief Justice of the Supreme Court, the Prosecutor-General and three judges chosen by all judges. However, the problems arose during the 10 years of the Council's existence resulted in replacing it with one person as the Head of Judiciary through the revision of the Constitution on 28 July 1989.¹³⁶ Recently, the Head of the Judiciary formed a council composed of his deputies, the Justice Minister and chairmen of organizations under control of the Judiciary although it is just a consultative council and the decisions are made by the Head of the Judiciary.

It should be taken into consideration that a detailed discussion on Iran's constitutional system is beyond the limited framework of this dissertation. Therefore, the information discussed in this chapter is very general and naturally cannot be complete.

After Iran's constitutional institutions were introduced, each institution's role in Iran's multilateral adoption process is discussed below.

¹³³ Ghamami (2011), p. 464.

¹³⁴ Principle 157 of Iran's Constitution.

¹³⁵ Ibid.

¹³⁶ For more information see Hashemi (2012), pp. 382-383.

3.6. Interactions Between Iran's Constitutional Institutions in the WTO Accession Process

The historical background, including the roots and origins, of Iran's legal system, the cornerstones and main elements of Iran's constitutional system and the constitutional institutions which can influence the adoption process of multilateral agreements and organizations were introduced above. This section discusses the role of each constitutional institution in the accession process to the WTO. Therefore, the relevant tasks of the Leader (3.6.1), the Executive (3.6.2), the Legislature (3.6.3), the National Expediency Council (3.6.4), and finally a discussion on Islamic judges and their judgments under Iran's legal system (3.6.5) are presented in turn below.

3.6.1. Leader's Role

As discussed above (3.5.1.1. Powers and Duties of the Leader), under Iran's Constitution the Leader has several tasks. The relevant tasks for the adoption process of multilateral agreements are: long-term strategy making and supervising compliance with Principle 110; settlement of important problems; and resolving controversies among the Executive, Legislature and Judiciary.

Regarding the long-term strategy making and supervising compliance with Principle 110, it should be taken into consideration that, for accession to the WTO, Iran needs to improve its strategies regarding the national economy, trade and business. Also, it needs to amend some of its legislation and regulations or adopt new legislation to make its 'laws, legislation and administrative procedures'¹³⁷ consistent with the WTO agreements. In doing so, first the National Expediency Council should adopt the required strategies and then they should be adopted by the Leader to be enforced. If adopted, they will be binding upon the Iran's Executive, Legislature and Judiciary. It is important to notice that the Leader can also supervise the proper enforcement of the adopted strategies through the National Expediency Council.¹³⁸ Therefore, even if the Government or another constitutional

¹³⁷ Article XVI:4 of the WTO Agreement.

¹³⁸ Principle 110 (2) of Iran's Constitution states: 'Supervising the proper implementation of the general policies of the system.'

institution takes measures that are inconsistent with the national policies adopted by the Leader, the measures shall be amended to be made consistent.

Another important role of the Leader in Iran's accession to the WTO can be taken from his tasks stated in Principle 110(8) which states: 'the settlement of important problems' (and also Principle 110 (7): 'resolving controversies among the Executive, Legislature and Judiciary'. On the basis of these tasks stated in Iran's Constitution, the Leader can remove the legal conflict between Iran's Constitution and the WTO. How this can be accomplished was discussed in the relevant section above.¹³⁹ This constitutional flexibility may constitute a potential solution to legal conflicts between Iran's Constitution and the WTO agreements, which will be explored in later chapters of this dissertation (discussed in chapter seven).

There are other important roles of the Leader influencing Iran's accession to the WTO which are discussed in chapter four.¹⁴⁰

After reviewing the role of the Leader in WTO accession, the following section reviews the role of the Executive.

3.6.2. The Executive and Multilateral Agreements

From the very beginning of the accession process to a multilateral agreement/organization like the WTO, the Executive, including the President and the Board of Ministers, is closely involved. The related role of the Executive to the mentioned process is discussed first generally as the task of the Government's ability to conclude multilateral agreements (1) and then specifically on the WTO issues (2). Each is examined in turn.

3.6.2.1 Task of the Government to Conclude International Agreements

There are two kinds of international agreements: multilateral and bilateral agreements. The international law of treaties includes the general rules to be abided by for international subjects (countries and organizations). The most important convention that includes the international law of treaties is the

¹³⁹ See section 3,5,1.1. (Powers and Duties of the Leader).

¹⁴⁰ See chapter four, section 4.3.6. (The Leader's Role in the Accession Process).

Vienna Convention on the Law of Treaties (1969).¹⁴¹ Also, to make an international agreement binding upon a country, each country has its own domestic treaty adoption process which shall be observed.

Iran's adoption process of international agreements is stated in Principles 77 and 125 of Iran's Constitution. Under the mentioned principles, the task of concluding international agreements is referred to the Executive. However, for making the agreements binding, there are also other constitutional institutions involved. The tasks of each constitutional authority in the treaty adoption process are defined in the laws and regulations which are discussed in the subsequent chapter.

It bears mentioning that Iran's adoption process of international agreements includes:

- Issuing full powers for the negotiation by the Board of Ministers for the relevant authority;
- Performing the necessary studies regarding the benefits and formalities of joining and its consequences for the relevant governmental institutions;¹⁴²
- Submitting a proposal, as well as a briefing report (including the benefits and disadvantages of adoption or accession), to the Board of Ministers;¹⁴³
- Checking whether any reservation is needed for the international agreement;¹⁴⁴
- Simple signature (temporary signature) should be done by the authority which is authorized by the Board of Ministers;¹⁴⁵
- Adopting the bill to which the international agreement is attached, by the Board of Ministers;
- Submitting the adopted bill to the Parliament;¹⁴⁶

¹⁴¹ Vienna Convention on the Law of Treaties, 23 May 1969, Signatories: 45 and Parties: 114, <https://treaties.un.org>, last visited on 1-10-2016.

¹⁴² Article 16(a) of the Instruction on How to Draft International Legal Agreements (2011).

¹⁴³ Article 16(b) of the Instruction.

¹⁴⁴ Article 16(c) of the Instruction.

¹⁴⁵ Article 2 of the Regulation.

- Signing the bilateral or multilateral agreements by the President when it is adopted by the Parliament and the constitutionality is checked by the Guardian Council;
- Depositing the documents of the agreement to the relevant Secretariat; and
- Providing legal grounds for the implementation of commitments after the agreement becomes binding (by the relevant governmental authority).¹⁴⁷

The whole adoption process is discussed in detail in chapter four. The role of the Executive is also important with regard to Iran's accession to the WTO. This role started years ago and would continue even after Iran joins the WTO. Part of this role is introduced below.

3.6.2.2. WTO Focus

After discussing the role of the Executive with regard to concluding international agreements in general, it is discussed how the Government can be involved in Iran's accession process.

The multilateral and bilateral negotiations are undertaken by the Executive and can involve several ministries or organizations. Currently there are 18 ministries in the Government.¹⁴⁸ The Ministry of Industries, Mines and Commerce is given the task of managing the accession of Iran to the World Trade Organization. Within this Ministry, this task is referred to the Trade Promotion Organization which therefore acts on behalf of the Government in the WTO negotiations. Because the trade negotiations can affect areas of

¹⁴⁶ Article 11 of the Regulation.

¹⁴⁷ Article 21 of the Instruction.

¹⁴⁸ These are: Ministry of Agricultural Jihad, Ministry of Culture and Islamic Guidance, Ministry of Defense & Armed Forces Logistics, Ministry of Economy and Finance Affairs, Ministry of Education, Ministry of Energy, Ministry of Foreign Affairs, Ministry of Health and Medical Education, Ministry of Industries, Mines and Commerce, Ministry of Intelligence, Ministry of Information & Communications Technology, Ministry of Interior, Ministry of Justice, Ministry of Petroleum, Ministry of Roads and Urban Development, Ministry of Science, Research, and Technology, Ministry of Cooperatives, Welfare and Social Security, Ministry of Sport and Youth Affairs. For more information see the website of the Iran's Government at www.dolat.ir, last visited on 1-10-2016.

responsibilities of other Ministries, a committee composed of delegates of several institutions has been established to discuss and support the accession negotiations.

Once the protocol of accession of Iran is adopted in the WTO, the accession documents should be submitted to the Parliament in the form of annexes to a bill by the Government. This is in accordance with Principle 77 of Iran's Constitution, which requires that accessions of Iran to the multilateral and bilateral agreements and treaties shall be adopted by the Parliament. Subsequently the President is authorized to sign the national law to which the international agreement is attached. Principle 125 of the Constitution states:

All the treaties, transactions, agreements, and contracts between the Government of Iran and other governments as well as all the pacts related to the international unions, after they are approved by the Islamic Consultative Assembly, must be signed by the President of the Republic or his legal representative.¹⁴⁹

Negotiations and the signing of multilateral agreements by the Government are discussed in more detail in chapter four.¹⁵⁰ There are also other tasks for the Government which are involved in the WTO accession and the post-accession phase which are as follows:

- Approving the Government's bills;
- Approving the settlement of state and public property disputes and their referral to arbitration;
- Responsibility to the Parliament; and
- Chairing the high councils.
- Approving the Government's bills (Principle 74 of the Constitution)

The Board of Ministers can approve bills and submit them to the Parliament to be discussed and approved there. Therefore, the protocol of Iran's accession to the World Trade Organization should first be adopted by the Government in the form of a bill to which the protocol is annexed, and then the bill will be submitted to the Parliament. There is also a requirement for the accession which provides that the 'laws, regulations and administrative procedures'

¹⁴⁹ Principle 125 of Iran's Constitution.

¹⁵⁰ See chapter four, section 4.3.2. (Negotiation and Signature by the Government).

should be consistent with the WTO multilateral agreements.¹⁵¹ Therefore, the amendments and new legislation should be drafted and approved first by the Government before they are submitted to the Parliament for approval.

- Approving the settlement of state and public property disputes and their referral to arbitration (Principle 139 of the Constitution)

Under Principle 139 of the Constitution, to settle the disputes on public and state properties, or the referral of the mentioned disputes to arbitration, the approval of the Government (the Board of Ministers) is necessary. It is worth mentioning that, if there is at least one non-Iranian involved in the dispute, an approval from the Parliament shall also be obtained. This is important because, after the accession of Iran to the WTO, disputes can arise between Iranian and non-Iranian companies with regard to the WTO agreements. Under Principle 139 of Iran's Constitution, first the approval of Government and then the approval of the Parliament are required to resolve the disputes in the WTO dispute settlement system.

- Responsibility to the Parliament (Principles 88 and 89 of the Constitution)

The ministers should respond to the questions asked by the Parliament. The ministers are also responsible to the Parliament when they are impeached by the members of the Parliament. The Parliament can also ask questions from the Board of Ministers on the progress of ongoing negotiations of Iran's accession to the WTO. This is important especially when the WTO accession is not a top priority issue for the Government. Then, the Parliament can induce the Government to actively pursue the accession negotiations.

- Chairing the high councils

There are a number of high councils in Iran.¹⁵² Under the rules of the Constitution, the Leader's decrees or laws, high councils should be chaired by the President. The high councils are composed of members from other

¹⁵¹ Article XVI:4 of the WTO Agreement.

¹⁵² Some of the high councils are: The Council for the Revision of the Constitution (Principle 177 of the Constitution); the Supreme Council for the National Security (Principle 176 of the Constitution); the High Council of Cultural Revolution (the Leaders' decree); the High Council for Cyberspace (the Leader's decree).

branches of the government such as the Parliament or the Judiciary and operate according to the 'separation of powers' principle.¹⁵³

The high councils and committees play an important role in the promotion of Iran's accession process. As discussed in chapter one of this dissertation (section on Iran's WTO accession process), in 1994 a committee was established to evaluate how accession to the GATT/WTO can benefit Iran. The report of this committee convinced Iran's Government to apply for WTO accession.

It was also a newly formed High Council consisting of various governmental institutions that addressed the several hundred questions concerning Iran's Memorandum on its trade regime which were received from the WTO Members in 2010. As announced by the Chairman of Iranian Trade Promotion Organization,¹⁵⁴ on 27 March 2015 a new committee was established to manage the accession negotiations.

After the bill regarding Iran's accession to the WTO is adopted by the Government, it shall be submitted to the Parliament. The important role of the Legislature in finalizing and the adoption of Iran's accession to the WTO is presented below.

3.6.3. Legislature (Interplay of the Parliament and the Guardian Council)

The roles of the Leader and the Government regarding the adoption process of multilateral agreements have been introduced above. This section describes how Iran's Legislature, including the Parliament and the Guardian Council, can deal first with multilateral agreements and then specifically with the WTO agreements.

¹⁵³ Principle 57 of Iran's Constitution has recognized the separation of powers where it states: 'The powers of Government in the Islamic Republic are vested in the Legislature, the Judiciary, and the Executive, functioning under the supervision of the absolute *Velayate Amr* and the leadership of the *Ummah*, in accordance with the forthcoming articles of this Constitution. These powers are independent of each other.'

¹⁵⁴ For further information see: <http://isna.ir/fa/news/93051708019>, last visited on 1-10-2016.

As presented in 3.5.4. (Legislature), both the Parliament and the Guardian Council are important institutions of the Legislature.¹⁵⁵ Both also play important roles when it comes to the adoption process of multilateral agreements such as Iran's protocol of accession to the WTO. In this context, a number of issues need to be addressed such as the role of the Parliament in concluding international agreements (A) and the role of the Parliament and the Guardian Council in addressing consistency of national law with WTO rules (B)

3.6.3.1. Role of Parliament in Concluding Multilateral Agreements

While laws are generally discussed in the Parliament through the 'two-reading method',¹⁵⁶ bills of bilateral or multilateral agreements and treaties¹⁵⁷ are usually adopted through the 'one-reading method'.¹⁵⁸ After the report of the relevant committee(s) is presented, two opponents and two proponents (from Parliament) discuss in detail all aspects of the bill and the representatives of the relevant committee and the Government will also discuss the bill. Then the bill will be put to vote.

However, if the Parliament approves the importance of the bill due to the Government's or the Parliament's suggestion (request), then the bill will be discussed by applying the 'two-reading method' in the Parliament which includes two phases: First, its totality will be discussed and the points raised including the objections and proposals on the bill will be referred to the relevant committee(s) to be discussed there. In the second phase, the result of the committee(s) discussions will be submitted to the Parliament and, after discussing the bill by one opponent and one proponent, it can be adopted.¹⁵⁹

¹⁵⁵ In some exceptional cases the National Expediency Council can also adopt legislation, however, this legislative power is not its normal task. The legislative power is exclusively given by the Constitution to the Parliament. Therefore, under Iran's Constitution, the National Expediency Council is not a part of the Legislature.

¹⁵⁶ Article 177 of the Parliament's Rules of Procedure, for further information see chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process).

¹⁵⁷ Under Principle 77 of Iran's Constitution, treaties, transactions, contracts, and all international agreements must be ratified by the Parliament.

¹⁵⁸ Article 176 of the Parliament's Rules of Procedure, for further information see chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process).

¹⁵⁹ Articles 176 and 177 of Rules of Procedure of the Parliament.

Iran has applied for accession to the WTO. The role that the Parliament and the Guardian Council play in Iran's accession to the WTO is discussed in chapter four;¹⁶⁰ and is also presented briefly below.

3.6.3.2. Role of the Parliament and the Guardian Council in Addressing the Consistency of National Law with WTO Rules

As is the case with international agreements, Iran's accession to the WTO shall be adopted by the Parliament and the constitutionality shall be checked by the Guardian Council (1) and, to join the WTO, Iran's national laws shall be consistent with the WTO agreements (2). To finalize Iran's accession process as well as to adopt the protocol of accession there are two important phases that shall be performed by the Parliament and the Guardian Council. These are discussed shortly below.

(A) Adoption of Iran's protocol of accession to the WTO

Principle 77 of Iran's Constitution requires the approval of Iran's accession to bilateral and multilateral agreements by the Parliament.

The adoption process of international agreements was briefly introduced in the previous sub-section. This process would be the same for adopting Iran's accession to the World Trade Organization. Therefore, after the protocol of Iran's accession to the WTO is adopted in the General Council of the WTO, it will be sent to Iran to be adopted under Iran's legal system. In this process the protocol of accession will be annexed to a governmental bill to be discussed and adopted in the Board of Ministers. Then, the bill and its annex shall be submitted to the Parliament to be discussed and adopted. It bears mentioning that due to the importance of accession to the WTO, it would be expected that the accession bill would be discussed in Parliament in two phases: first by the relevant committees of the Parliament and then in the general assembly. Then, it shall be submitted to the Guardian Council for checking the constitutionality.

For accession to the WTO, the consistency between Iran's national law and the WTO shall also be checked. This is discussed below.

¹⁶⁰ See chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process).

(B) Consistency with WTO rules

Following the examination of the legislative process that the WTO agreements have to follow in the Iranian Parliament, it is examined how the consistency of the WTO rules with the Iranian laws and regulations can be safeguarded. Under Article XVI (4) of the WTO Agreement, all laws, regulations and administrative procedures of the acceding country should be fully consistent with the WTO agreements. In case the Parliament finds inconsistencies between national law and WTO rules, the Parliament might need to amend existing legislation or adopt new legislation if legal conflicts are identified. It is therefore important to first examine how the constitutionality is being assessed.

Not only the decision to accede to the WTO is subject to intense scrutiny under Iranian law but also all other laws, rules, acts by the Parliament and Governmental institutions must be in compliance with the WTO while at the same time be compatible with Iran's legal system.¹⁶¹ Pursuant to Principle 85 of the Constitution, governmental approvals shall be sent to a committee in the Parliament to be checked and, if they are inconsistent with the laws approved by the Parliament, they will be sent back to the Government to remove the inconsistency. These enforcement mechanisms are formulated by the Constitution to ensure that all governmental regulations are consistent with the Constitution and Islamic rules. Should there be any inconsistency between the amended or new regulations and the legislations which had been approved by the Parliament, the inconsistencies in the form of either regulation or legislation should be removed through amendments and new approvals.

After examining how the constitutionality of WTO and Iranian laws and regulations is being assessed, the possibility of safeguarding the constitutionality is examined. Also here there are several options. Because amending the Constitution is inherently difficult, since a very complicated and time-consuming amendment process should be followed to amend the Constitution,¹⁶² it may not be the best way to remove potential legal

¹⁶¹ See Article XVI:4 of the WTO Agreement.

¹⁶² Under Principle 177 of Iran's Constitution, there is very complicated and time-consuming process to amend the Constitution and it shall be adopted through a

inconsistencies. A more elegant way would be for the Parliament to issue required clarifications or interpretations for a proper implementation of the legislation in order to remove possible inconsistencies between Iran's legal system and WTO law. Such WTO inconsistencies are expected to arise *inter alia* in relation to Principle 139 of the Constitution that requires that the Parliament decides if state and public property disputes involving non-Iranians can be subject to dispute settlement systems. This is discussed in chapter five.

There are a few interpretations which have been issued on Principle 139 of the Constitution. On the basis of one of these interpretations, as it is discussed in chapter five, the constitutional requirements stated in Principle 139 do not include the referral of disputes to judicial disputes settlement systems.¹⁶³ Therefore, it can be asserted that, if the WTO dispute settlement system were merely judicial, there would be no conflict between the WTO dispute settlement system (DSS) and Principle 139. However, as it was discussed in chapter two, the DSS is a quasi-judicial system which includes judicial and arbitration dispute settlement mechanisms.

After introducing the role of the Parliament and the Guardian Council in Iran's accession to the WTO, there are some arguments which should be taken into consideration regarding the Parliament's decisions on the adoption of international agreements.

A question which can be raised from a constitutional law perspective is whether the Parliament's decision on Iran's accession to the World Trade Organization is an approval or if it is beyond the scope of Principle 94 of the Constitution. In other words, it can be argued that, if the Parliament cannot modify the provisions of the protocol of Iran's accession to the WTO, then the Parliament's decision can be interpreted as being a mere formality. Also, if

referendum. It can be also argued whether the Constitution needs to be amended in the accession of Iran to each individual multilateral agreement and organization.

¹⁶³ It bears mentioning that, as it will be discussed in section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?) in some cases, referral to international courts has been also considered by the Guardian Council as inconsistent with Principle 139 of the Constitution.

it is just a formality, it cannot be considered an approval to be sent to the Guardian Council pursuant to Principle 94 of the Constitution.

In practice, all accessions to multilateral agreements have been sent by the Parliament to the Guardian Council to be checked for constitutionality. In addition, the Parliament's decision on adopting the accession of Iran to bilateral and multilateral agreements is not a mere formality. Article 177(2) of the Rules of Procedure of the Parliament states that the Parliament members can ask the Government to change some provisions of the agreement after renegotiation with other party(ies). If amendments to an international agreement have been achieved, the agreement can be adopted by the Parliament. Such renegotiations may be cumbersome in the case of bilateral agreements and they may prove to be practically impossible in the case of multilateral agreements. To respond to raised concerns from the Parliament on multilateral agreements, the Government can formulate a unilateral interpretative declaration. However, it is doubtful if this can work in the case of Iran's accession to the WTO. Especially regarding the conflict between Iran's Constitution and the WTO Dispute Settlement Understanding, it is expected that, even if the Parliament adopts Iran's protocol of accession to the WTO, the Guardian Council will reject the approval due to its inconsistency with the Constitution.

The Parliament usually checks the constitutionality and does not approve legislation which is inconsistent with the constitutional rules, unless approving the inconsistent legislation is vital for the country and the Parliament just ignores the constitutionality to let the issue of inconsistency be resolved in other constitutional institutions such as the National Expediency Council.

Furthermore, on the basis of a systematic interpretation of the relevant principles of Iran's Constitution, it can be asserted that, since all multilateral treaties have been sent by the Parliament to the Guardian Council in the past, treaties such as Iran's protocol of accession to the WTO should also fall within the scope of Principle 94 of Iran's Constitution and be sent to the Guardian Council. Furthermore, Iran's Parliament has always sent the treaties to the Guardian Council and the Council has always accepted treaties to be examined there under Principle 94 of Iran's Constitution. Therefore, if Iran's

protocol of accession to the WTO is approved by the Parliament, it should be sent to the Guardian Council for an examination of its constitutionality.

Under Principle 94 of Iran's Constitution, the Guardian Council should examine the Parliament's approval within 10 days. However, under Principle 95 of the Constitution, it can extend this period up to 20 days. If the Guardian Council finds any inconsistency between the Parliament's approvals and the constitutional and Islamic rules, the approval is sent back to the Parliament to be reviewed again. In a situation where the Parliament refuses to remove the inconsistency, the conflict remains and the parliamentary approval cannot be finalized nor enforced, unless, as discussed in this chapter,¹⁶⁴ the conflict is sent to the National Expediency Council to be resolved there under Principle 112 of Iran's Constitution. Under Principle 112, the disputes between the Parliament and the Guardian Council on constitutionality with regard to Parliament's approvals are discussed and resolved in the National Expediency Council. (This is discussed in section 3.5.5. National Expediency Council.)¹⁶⁵

In the alternative, the Parliament can also decide directly to follow an unconventional route, before the adoption by the Parliament, and send a request to the Head of the National Expediency Council for it to be directly referred to and decided by the National Expediency Council under Principle 110(8). Under Principle 110(8), if an issue cannot be resolved through ordinary means (such as the Government and the Parliament), the Leader can be requested to refer it to the National Expediency Council to be resolved.

Therefore, either through Principle 112 or via Principle 110(8), the National Expediency Council can play a key role in Iran's accession process to the WTO. This role is introduced below.

3.6.4. National Expediency Council's Role

As will be discussed in chapter five in detail, Iran's accession to the WTO can be rejected by the Guardian Council due to its unconstitutionality. This

¹⁶⁴ See section 3.5.4. (Legislature), and also section 3.5.5. (National Expediency Council).

¹⁶⁵ Principle 112 of Iran's Constitution is discussed in this chapter, see chapter 4, section 4.3.5. (The Role of the National Expediency Council in the Accession Process) and also in chapter 7, section 7.4.1. (Principle 112) with regard to suggesting solutions to remove the legal impediment to Iran's accession to the World Trade Organization.

problem can be resolved by the National Expediency Council. Therefore, it is discussed below How the Council deals with international agreements such as the WTO agreements (3.6.4.1 How the Council Deals with International Agreements such as the WTO Agreements); and finally there are some important questions to be taken into consideration with regard to the Council such as: can the National Expediency Council's approvals be inconsistent with Islamic rules, can the National Expediency Council interpret the Constitution, can an Issue be sent directly to the National Expediency Council, and are the National Expediency Council's decisions on multilateral agreements temporary? (3.6.4.2. Important Questions on the National Expediency Council).

3.6.4.1 How the Council Deals with International Agreements such as the WTO Agreements

In the adoption of international agreements by the Parliaments, sometimes constitutionality can result in legal impediments. To remove such legal impediments, there are two solutions which can either come under Principle 112 or Principle 110(8).

A) Principle 110 (8) method: to find solutions to resolve the problems which cannot be resolved by conventional methods. The solutions should be approved and enforced by the Leader.

Under Section (8) of Principle 110 of Iran's Constitution, those serious problems which cannot be resolved through conventional methods¹⁶⁶ can be resolved by the National Expediency Council.¹⁶⁷ In other words, if a serious problem arises and it cannot be resolved for example through the approval of a bill in Parliament, the National Expediency Council can resolve the problem and the result should be approved by the Leader. This can also happen with regard to the adoption process of Iran's accession to the WTO, which can include inconsistencies with the Constitution and Islamic rules. For a better

¹⁶⁶ Conventional methods are the normal mechanisms which are stated in the Constitution, such as the dispute resolution through the decisions of constitutional institutions such as the Parliament, Government, the National Expediency Council and the Guardian Council. For instance, issuing an interpretation by the Guardian Council to resolve a dispute is a conventional method.

¹⁶⁷ Principle 110(8) of Iran's Constitution.

understanding of how this process works in the National Expediency Council, some examples are mentioned below.

One of the most important decisions of the National Expediency Council under Section (8) of Principle 110 is its approval regarding the 'Combatting Illicit Drugs Law'.¹⁶⁸ This legislation was approved on 25 October 1988. Even though the country needed this legislation, it could not be approved by the Parliament. This was due to the fact that the draft of the law included two problematic elements: the first one was inconsistent with Islamic rules and the second one was inconsistent with the Constitution. Therefore, it was impossible for the Parliament to approve such a law. The first factor which resulted in this serious problem was that the death penalty was stipulated as the punishment for those found to be engaged in drug trafficking. Under Islamic rules, the death penalty is restricted to a limited list of crimes. Therefore, approving the death penalty for new crimes was inconsistent with Islamic rules. Therefore, the Leader, as *Valiye Faqih*, referred the issue to the National Expediency Council to suggest a solution and in order for it to be binding it needed to be subsequently approved by the Leader.

The second problem concerned the legal position of the institution that was to manage all issues on combating illicit drugs. This institution has been defined in Article 33 of the law, composed of representatives from both the Executive and the Judiciary. The problem was that this institution was to be chaired by the Head of the Executive, even though it includes representatives from two different powers. This was inconsistent with the 'separation of powers' principle which is a standard norm in public and constitutional law. As this norm is also enshrined in Iran's Constitution, there is a conflict between this norm and the intended chair of this institution. In other words, under the separation of powers norm, an institution which includes members from different powers cannot be chaired by the head of one power.¹⁶⁹

This legislation was approved by the National Expediency Council and then it was approved and enforced by the Leader. It bears noticing that, under Iran's Constitution, when there is a serious problem which cannot be resolved (or it

¹⁶⁸ [قانون مبارزه با مواد مخدر], (Translation S.A).

¹⁶⁹ For further information on the Headquarter see the website at: <http://dchq.ir/en/>, last visited on 1-10-2016.

takes too much time to be resolved) through conventional methods, it is usually the Chairman of the National Expediency Council who requests an authorization from the Leader that the issue be resolved under the method stated in Section (8) of Principle 110 of the Constitution.

Some Iranian law experts¹⁷⁰ have criticized this method of law making by the National Expediency Council. They believe that this task should be exclusively performed by the Parliament. The Council should avoid (initially) approving legislation such as for example the 'Combating the Illicit Drugs Law'. These law experts believe that such laws can be approved by the Parliament and then the problem can be resolved under Principle 112 of the Constitution. In other words, they argue that, to respect the exclusive legislative power position of the Parliament, the method under Principle 110 (8) should not be used too readily to resolve a problem, unless, it is impossible for the problem to be resolved through conventional methods.

Using the method stated in Section (8) of Principle 110 is one of the solutions suggested in chapter seven of this dissertation to remove the legal impediment to Iran's accession to the World Trade Organization. It will be explained in chapter seven that the method stated in Principle 110(8) of Iran's Constitution can remove the legal impediment to Iran's accession to the WTO. Iran's accession to the WTO can be referred to the National Expediency Council either before its submission to the Parliament by the Government or during its adoption by the Parliament. This is due to the constitutionality issue. WTO accession can be blocked by the Guardian Council, as it cannot be adopted through conventional methods, but it can be directly referred by the Leader to the Council to be resolved. This method can work faster and rather easier than the method under Principle 112 with regard to Iran's accession to the WTO. This is because, after Iran's protocol of accession is adopted by the WTO and then adopted by Iran's Board of

¹⁷⁰ Such as Hossein Mehrpour, for further information see his essay on the National Expediency Council: H. Mehrpour, "The National Expediency Council and its Legal Position [مجمع تشخیص مصلحت نظام و جایگاه حقوقی آن]", *Legal Research Journal مجله تحقیقات* (1992), pp. 39, 40 and 47. The legislative task of the National Expediency Council has been also criticized by Mohammad Hossein Zarei: M.H. Zarei, "Iran's Legislative Regime and the Position of the National Expediency Council", *Rahbord* (2005), pp. 320-333.

Ministers, it can be directly requested from the Leader to be referred to the National Expediency Council and therefore it does not need to be discussed in the long term adoption process of the Legislature including the Parliament and the Guardian Council. However, this method has never been used for an adoption process of bilateral and multilateral agreements.

There is also another solution which is very often used by the Parliament to remove the problem of constitutionality in relation to accession to international agreements which is discussed below.

B) Resolving the Disputes between the Parliament and the Guardian Council under Principle 112

To resolve the disputes between the Parliament and the Guardian Council under Principle 112 of Iran's Constitution, the 'expediency', which means the national interest, should be recognized by the National Expediency Council. Under Article 25 of the Internal Regulation of the National Expediency Council, if the Guardian Council is of the opinion that the Parliament's approval is inconsistent with Islamic or constitutional rules, it must communicate its views to the Parliament. The Parliament has the opportunity to revise its approval. If the Parliament, by taking into account the national interest, insists on its decision and does not make its approval consistent with Islamic and constitutional rules, the approval can be sent to the National Expediency Council by the Head of the Parliament.¹⁷¹ However, under Article 202 of the Rules of Procedure of the Parliament,¹⁷² whether the Parliament changes its approval to remove the inconsistency or not, the approval should be sent again to the Guardian Council and, when it is sent back to the Parliament for the second time, only then can the Head of the Parliament send it to the National Expediency Council.

Under Article 28 of the Internal Regulation of the National Expediency Council, sometimes resolving disputes between the Guardian Council and the Parliament results in amendments to the Parliament's approval. Then, if

¹⁷¹ See the full text of Article 25 of Internal Regulation of the National Expediency Council at the Council's website at: <http://rc.majlis.ir/fa/law/show/99607>, last visited on 1-10-2016.

¹⁷² Article 202 of the Rules of Procedure of the Parliament.

those amendments are dependent on making more amendments in other articles, the National Expediency Council, to the extent which is necessary, can make the required amendments.¹⁷³ Further, under Article 29 of the National Expediency Council's Internal Regulation, to resolve a dispute between the Guardian Council and the Parliament, in recognizing expediency (national interest), the National Expediency Council members can make their votes conditional on amendments to be made in another part of the approval which has not been disputed by the Guardian Council. Such amendments can be implemented if they are authorized by the Leader.¹⁷⁴ These two articles, namely Articles 28 and 29 of the National Expediency Council's Internal Regulation, show that the Council is not just an arbitral tribunal to settle disputes between the Parliament and the Guardian Council. Therefore, if the Parliament insists on its view and the Guardian Council also has a different view, in recognizing the national interest, the National Expediency Council can approve its own view which can be different from the other two views. The Council can also change other parts of the Parliament's approval (subject to the Leader's permission) which are not relevant to the dispute.

It is worth mentioning that many of the bilateral and multilateral agreements (which were first approved by the Parliament but due to their inconsistency with the Constitution were referred back to the Parliament by the Guardian Council) have been referred to the National Expediency Council. They were then subsequently approved under the Principle 112 of the Constitution. Some of those agreements are mentioned in chapter 4.¹⁷⁵

In order to clarify how Principle 112 of Iran's Constitution works in practice, a bilateral agreement that was approved under principle 112 is presented below.

The Bilateral Agreement on Extradition of Criminals between the Islamic Republic of Iran and the Republic of India is one of the agreements which was adopted under Principle 112 of Iran's Constitution. This Agreement was signed on 2 November 2008 and submitted to the Parliament by the Government on 21

¹⁷³ See the full text of Article 28 of Internal Regulation of the National Expediency Council.

¹⁷⁴ See the full text of Article 29 of Internal Regulation of the National Expediency Council.

¹⁷⁵ See chapter four, section 4.3.5.5. (International Agreements Adopted by the NEC).

April 2009. The agreement was adopted on 27 June 2009 in the Parliament and sent to the Guardian Council. However, due to inconsistencies with the Islamic rules, the agreement was sent back to the Parliament on 18 July 2009. In the Guardian Council's official letter to the Parliament, it states the reasons for sending the agreement to the Parliament. The excerpt below elaborates upon these reasons:

Similar to the views which have been stated on other similar agreements: due to this fact that the generality of many articles of this approval enforces other party's rules which (can be) inconsistent with Islamic norms; and a number of its articles, such as Sections (1) and (3) of Article 1 and Article 3, which require recognition of laws and procedural rules of Indian courts; and also referral of judicial tasks to the other party of the agreement which per se leads to recognition of the judgements issued in those courts (Indian courts), while the judgments are issued inconsistent with Islamic rules, (therefore) this agreement is viewed as inconsistent with Islamic rules.¹⁷⁶

Under the above-mentioned decision of the Guardian Council, the judicial decisions issued by non-Islamic courts are not recognized in Iran's legal system.¹⁷⁷ For these reasons the agreement was sent back to the Parliament. The Parliament insisted on its approval and did not change the agreement's provision to remove the inconsistencies. It was therefore submitted to the National Expediency Council. There it was examined under Principle 112 of the Constitution which states:

The leadership orders the Expediency Council to meet in order to attend to cases where the Guardian Council finds legislation made by

¹⁷⁶ For further information see the Parliament's Research Centre website at: http://rc.majlis.ir/fa/legal_draft/show/720702, last visited on 1-10-2016, (Translation S.A).

¹⁷⁷ There are some requirements to recognize foreign courts' decisions in Iran's legal system. However, in general they cannot be automatically recognized in Iran's legal system. For instance, Article 972 of Iran's Civil Code states: 'Effect cannot be given in Iran to judgments issued by foreign courts and official documents recognized as being enforceable by law in a foreign country unless an order to do so is issued in accordance with Iranian laws.', http://www.wipo.int/wipolex/en/text.jsp?file_id=197898, last visited on 1-10-2016.

the Islamic Consultative Assembly in violation of the *Shariat* or the Constitution; the Assembly, with regard to the welfare of the system, does not sustain the opinion of the Guardian Council.¹⁷⁸

The agreement was examined and approved on 15 May 2011 in the National Expediency Council and it was stated that 'the agreement was discussed in the formal session of the National Expediency Council and then, the Parliament's view was approved'.¹⁷⁹

The Guardian Council's view on the *Bilateral Agreement on Extradition of Criminals between the Islamic Republic of Iran and the Republic of India* shows that even if it is not clear when the agreement is enforced, its implementation will be inconsistent with Islamic norms or not, it can be rejected by the Guardian Council. Therefore, the Guardian Council can reject the approval of an international agreement merely on the basis that the agreement may in the future (when it is enforced) possibly turn out to be inconsistent with the Constitution. In other words, the Guardian Council takes a very precautionary approach to international agreements. If there is any chance that an international agreement might reveal itself in the future (i.e. when enforced) as being inconsistent with the Constitution, the Guardian Council will object to the approval of such an agreement. It bears mentioning that this practice can also be followed by the Guardian Council with regard to Iran's protocol of accession to the WTO. In other words, if under Guardian Council's view, one of the WTO agreements may in the future possibly turn out to be inconsistent with Islamic rules or the Constitution, the protocol of accession can be rejected in its adoption process. This can also be the same if only a limited number of disputes under the WTO covered agreements involve with Iran's state and public properties. Then, under Principle 139 of Iran's Constitution, settlement of these disputes shall be authorized by the Parliament.

An important question regarding the legal positions of the National Expediency Council's decisions in general is whether other constitutional institutions such as the Parliament can amend them. In response to this

¹⁷⁸ Principle 112 of Iran's Constitution.

¹⁷⁹ For further information see the Parliament's Research Centre website at: http://rc.majlis.ir/fa/legal_draft/show/720702, last visited on 1-10-2016.

question, which was asked to the Guardian Council by the Chairman of the National Expediency Council, the Guardian Council issued interpretations on the legal position of the National Expediency Council's decisions.¹⁸⁰ Under those interpretations, it is clearly stated that the National Expediency Council's decisions have primacy over all legislation in the country.

One of the solutions suggested in chapter seven 7.4.1. (Principle 112) of this dissertation to remove the legal impediment of Iran's accession to the World Trade Organization is to use the method stated in Principle 112 of Iran's Constitution. The legal impediment which should be removed is the result of a conflict between Principle 139 of Iran's Constitution on dispute settlement and the WTO Dispute Settlement Understanding. To join the World Trade Organization, Iran needs to be subject to the WTO dispute settlement system. The dispute settlement system contains dispute settlement rules which oblige WTO Members to participate as a responding party in disputes against them. However, under Principle 139 of Iran's Constitution, referral of a dispute with non-Iranians on public or state properties to non-judicial dispute settlement systems should be approved by the Parliament. This results in a conflict, which can be removed, among other suggested methods, through the method under Principle 112 of Iran's Constitution. This will be elaborated on in 7.4.1. Principle 112.

3.6.4.2. *Important Questions on the National Expediency Council*

There are some questions which can arise in addressing Iran's accession to the WTO and the National Expediency Council. These key questions are discussed briefly below.

- (1) Can the National Expediency Council's approvals be inconsistent with Islamic rules?
- (2) Can the National Expediency Council interpret the Constitution?
- (3) Can an issue be sent directly to the National Expediency Council?
- (4) Are the National Expediency Council's decisions on multilateral agreements temporary?

¹⁸⁰ The Guardian Council's Interpretations number 4575 on 23 May 1993 and number 5318 dated 15 October 1993 which were issued on Principle 112 of Iran's Constitution. For detailed information see the Guardian Council's website on interpretations at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

(1) The first question is on whether the National Expediency Council's approvals can be inconsistent with Islamic rules.

This question has been asked twice by the Head of the National Expediency Council to the Guardian Council. The Guardian Council has issued two interpretations to answer the raised question clearly. The first Guardian Council's response is based on Principle 4 of the Constitution which states that all 'laws and regulations must be based on Islamic criteria.'¹⁸¹ The Guardian Council states:

On the basis of Principle 4 of the Constitution, the National Expediency Council's approvals cannot be inconsistent with Islamic criteria.¹⁸²

For further clarification, the second question was asked one month later on the basis of the first interpretation by the Head of the National Expediency Council:

Please declare the Guardian Council's view on the term 'inconsistent with Islamic criteria' which is used in section 3 of the above-mentioned interpretation. This is due to this fact that pursuant to Principle 112 of the Constitution, the (National Expediency) Council's position is determination on these issues.¹⁸³

In answering this question, The Guardian Council issued the second interpretation on Principle 112 of the Constitution as follows.

¹⁸¹ Principle 4 of Iran's Constitutions states that: 'All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This Principle governs all the articles of the constitution, and other laws and regulations. The determination of such compatibility is left to the Fiqaha of the Guardian Council.'

¹⁸² The Guardian Council's Interpretation number 4575 dated 24 May 1993 which was issued on Principle 112 of Iran's Constitution, (Translation S.A). For detailed information see the Guardian Council's website on interpretations at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

¹⁸³ The question asked by the Head of the National Expediency Council on Principle 112 of the Constitution, no. 3786-2409 dated 24 June 1993, (Translation S.A), <http://www.shora-gc.ir>, last visited on 1-10-2016.

By the term 'inconsistent with Islamic criteria' it is meant that (the National Expediency Council's approvals) shall not be inconsistent neither with the primary rules of Islam, nor the secondary Islamic rules. And in this respect, the beginning of the Principle 112 has merely authorized determination on (the basis of) secondary titles (rules).¹⁸⁴

Under Islamic rules, when, in exceptional circumstances, the primary and normal rules cannot be implemented, they can be replaced with the secondary rules. Therefore, according to the second interpretation on Principle 112, decisions of the National Expediency Council must be consistent with Islamic rules and if, due to some special reasons such as the national interest, the first rules cannot be followed, the secondary rules can be temporarily applied.

It bears mentioning that there are six *Faqihs* (*Mojtahids*) who decide in the Guardian Council as to whether the Parliament's approvals are inconsistent with Islamic rules or not. These six *Faqihs* are also members of the National Expediency Council. Therefore, when the National Expediency Council decides under Principle 112 on the Parliament's approvals, the final decision also includes the views of the *Faqihs*. In other words, when the six *Faqihs* sit in the Guardian Council, they decide on the basis of the primary rules of Islam, and when in the National Expediency Council, they decide on the basis of the secondary rules. Therefore, both decisions are consistent with Islamic criteria, even though in the National Expediency Council they accept the same issue which had been rejected by them before.¹⁸⁵

(2) *Another important point is whether the National Expediency Council can interpret the Constitution.*

¹⁸⁴ The Guardian Council's Interpretation number 4872 dated 11 July 1993 which was issued on Principle 112 of Iran's Constitution, (Translation S.A). For detailed information see the Guardian Council's website.

¹⁸⁵ It bears mentioning that under Iran's legal system, inconsistency with the Constitution can be ignored by the National Expediency Council. However, inconsistency with Islamic rules can be ignored only by an Islamic leader (*Faqih*/*Mojtahid*) or by the Leader who is also an Islamic leader. This is also a part of the theory of *Velayate Faqih*. I think that is why the National Expediency Council is defined under chapter eight of the Constitution which states the powers and duties of the Leader.

Under Principle 98 of Iran's Constitution, the Guardian Council possesses the exclusive power to issue interpretations on the Constitution. Principle 98 states:

The interpretation of the Constitution is the responsibility of the Guardian Council. This is determined with the approval of three-fourths of its members.¹⁸⁶

Therefore, no constitutional institutions other than the Guardian Council can issue interpretations on the principles of the Constitution. This exclusive right of the Guardian Council does not affect the legal position of other kinds of interpretations which can be formed on the basis of the practice of the Constitution by other institutions, such as the Government, Parliament and the National Expediency Council, or of the academic discussion by law experts.

The Constitution has assigned the task of interpretation to the Guardian Council to avoid the problems which can arise from the conflict between different interpretations from various constitutional institutions. Therefore, in the case of any conflict between the Guardian Council's authentic interpretation and other kinds of interpretations such as systemic or doctrinal interpretations, the authentic interpretation which is issued by the Guardian Council prevails.

(3) Another question regarding the tasks of the National Expediency Council is if an issue can be sent directly to the National Expediency Council.

To answer this question, it is necessary to differentiate between the tasks granted to the Council by the Constitution. For example, to resolve the dispute between the Parliament and the Guardian Council under Principle 112, the issue cannot be directly sent to the National Expediency Council. As discussed above, the Head of the Parliament can refer the Parliament's approval to the National Expediency Council after it has been approved in the Parliament and rejected by the Guardian Council. Then, the Parliament does not amend its approval, it will be sent again to the Guardian Council and then, if it is sent back to the Parliament, the Head of the Parliament can send it to

¹⁸⁶ Principle 98 of Iran's Constitution.

the National Expediency Council as a dispute to be resolved there. Therefore, this process is clearly defined in Principle 112: *'where the Guardian Council finds legislation made by the Islamic Consultative Assembly in violation of the Shariat or the Constitution; the Assembly, with regard to the welfare of the system, does not sustain the opinion of the Guardian Council'* and is also addressed in Article 202 of the Rules of Procedure of the Parliament.¹⁸⁷

However, there are other tasks assigned to the National Expediency Council which can be directly referred to the Council by the Leader. For instance, *'resolving issues in the system that cannot be settled by ordinary means'*¹⁸⁸ or *'consulting on affairs that the leadership will refer to the Expediency Council.'*¹⁸⁹ To conclude the issue on the protocol of Iran's accession to the WTO, if it is not expected to be adopted by the Parliament and the Guardian Council, the Head of the National Expediency Council can ask the Leader for it to be adopted there under Principle 110(8) of the Constitution. This method will also be discussed in 7.4.2. Principle 110(8).

(4) Are the National Expediency Council's decisions on multilateral agreements temporary?

As discussed, the National Expediency Council's main task is to decide on the basis of expediency (national interest). An issue is usually sent to this Council when there is a dispute between the Parliament and the Guardian Council on constitutionality. The unconstitutionality arises when a parliamentary decision is inconsistent with the Constitution or Islamic principles. Then, if the dispute is referred to the National Expediency Council, it resolves the dispute on the basis of expediency (national interest).

¹⁸⁷ Article 202 of The Parliament's Rules of Procedure states: 'After investigation of the committee report, honoring the view of the Guardian Council, and after voting on it, the approval will be sent again to the Guardian Council. If the approval still fails to address views of the Guardian Council, it will be presented to the Parliament again and if Parliament, considering exigencies of the system, still holds its view, the Speaker will send the approval to the Expediency Council. The Council will have the responsibility to offer its ultimate comments on the points of disagreement and on related cases and inform the Speaker of its report for the incoming phases.' (Translation Iran's Parliament: <http://en.parliran.ir/eng/en/The%20Rules%20of%20Procedure>).

¹⁸⁸ Principle 110 (8) of Iran's Constitution.

¹⁸⁹ Principle 112 of Iran's Constitution.

In theory, if something is inconsistent with the Constitution (including Principle 4 on Islamic principles) and it is authorized by the National Expediency Council because of national interest, it cannot continue indefinitely. If an inconsistency with the Constitution continues, it requires a revision to the Constitution. Regarding the inconsistency with Islamic principles, it would be more complicated due to the difficulty of a revision of the relevant Islamic rules.

In practice, however, thus far the decisions of the National Expediency Council have not been legally taken as temporary. And, in particular, the decisions on accession to multilateral agreements cannot be regarded as temporary. Otherwise the adoption should be recognized as conditional or temporary which in most cases would not be accepted by other members. Regarding the accession to the WTO, a temporary or conditional adoption or any reservation to the DSU is not accepted. To conclude, if Iran's accession to the WTO is adopted by the National Expediency Council, this adoption – similar to other decisions on accession to multilateral agreements by the Council – will not be temporary.

The interactions of Iran's constitutional institutions with regard to the adoption process of protocol of accession to the WTO were presented. An important question that also arises in relation to the accession to the WTO is about the recognition of judgments of non-Islamic judges in Iran's legal system. This is discussed below.

3.6.5. Non-Muslim Judges and Iran's Legal System

The general process of how multilateral agreements can be adopted in Iran's constitutional system was briefly discussed. It is also necessary to discuss whether Iran's legal system recognizes the judgments of non-Islamic judges such as those in the WTO dispute settlement system. Discussing this issue is important due to the importance of the specific definitions of judges and judgments under Iran's legal system. How the results of the referral of disputes to the WTO dispute settlement system can be recognized by Iran's legal system is discussed below.

As it will be discussed in chapter five, section 5.3.3. (Authentic Interpretation), due to an interpretation that has been issued by the Guardian Council on Principle 139, the referral of disputes to judicial dispute settlement systems do

not need to be authorized by the Parliament. However, the Guardian Council has sometimes taken the referral of disputes to some international judiciary systems as being inconsistent with Principle 139 of the Constitution.¹⁹⁰ Nevertheless, it can be argued that the WTO dispute settlement system is a judicial system and, therefore, there would not be any conflict between Iran's Principle 139 and the WTO Dispute Settlement Understanding (DSU).

To respond to this question, it bears mentioning that, as was discussed in detail in chapter 3, section 2.3.7. (on the nature of the DSS), the WTO dispute settlement system includes legal, diplomatic, judicial and non-judicial mechanisms to resolve the disputes over the WTO agreements. That is why the DSS is considered a quasi-judicial system and not just a judicial one.

Even if the WTO dispute settlement system were a mere judicial system, recognizing the competence of panelists, Appellate Body Members and other authorities who issue the judgments (rulings, reports and suggestions) would be controversial in Iran's legal system under the Constitution. This is because, under Islamic rules, there are some specific qualifications that judges must meet. Iran's Constitution merely recognizes those judgments which are issued by judges who are qualified under Islamic rules. The Preamble of Iran's Constitution states:

Provisions must be made to create a judicial system that is based on Islamic justice and is composed of just judges who are aware of the precise criteria laid down in Islam. Given the sensitive nature of the Judiciary and the need for its ideological correction...¹⁹¹

Also Principle 163 addresses the 'jurisprudence' as the main criteria for judges' qualifications. Principle 163 states:

The attributes and qualifications of a judge are defined through the law in accordance with the criteria of jurisprudence.¹⁹²

These criteria, as stated in Principle 36, are also used for the qualified courts.¹⁹³

¹⁹⁰ See the relevant discussions in chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

¹⁹¹ Preamble of Iran's Constitution.

¹⁹² Principle 163 of Iran's Constitution.

The important question therefore is what is the Islamic jurisprudence which is emphasized in Iran's Constitution as the required qualification for judges?

Jurisprudence can be defined as *Ijtihad*, which is one of the basic qualifications, as mentioned in the relevant sections, of the members of Assembly of Experts, six members of the Guardian Council and the Leader. Under Islamic rules, the judge's task is given from the God to the Prophet Mohammad and his successors and from them to *Mujtahids*¹⁹⁴ i.e. to a person who has *Ijtihad*. Under Iran's Constitution and also the theory of *Velayate Faqih*, which was introduced in the beginning of this chapter, the Leader is appointed by the Assembly of Experts and possesses the required qualifications of *Ijtihad* is the person who can issue the judgment.

Under Principle 157¹⁹⁵ of the Constitution, the Leader grants this task to a *Mujtahid* to manage the Judiciary. Pursuant to Principle 158 (3),¹⁹⁶ the Head of the Judiciary appoints other judges. There are not many *Mujtahids* in the country, and so the Head of Judiciary can also appoint 'authorized judges'. An authorized judge is a person who possesses the standard level of knowledge such as legal expertise to issue a judgment, even though is not a *Mujtahid*.

What is very important is that having *Ijtihad* is just one of the qualifications which can be ignored due to a necessity of having judges in the country. However, there are some other qualifications which cannot be ignored such as being Muslim. Iran's legal system does not even recognize the judgments of judges from other Muslim countries. That is why the bilateral agreements between Iran and other Muslim countries on judicial assistance are usually rejected by the Guardian Council due to their unconstitutionality. Therefore,

¹⁹³ Principle 36 of Iran's Constitution states: 'The ratification and execution of a sentence may only be carried out through a qualified court and must be in accordance with law.'

¹⁹⁴ Khomeini (2008), the Judgement Chapter, p. 662.

¹⁹⁵ Principle 157 of the Constitution states: 'order to fulfil the responsibilities of the Judiciary in all of the judicial, administrative, and executive matters, the leadership designates for a period of five years a just scholar of jurisprudence (mujtahid), who is knowledgeable of judicial matters and is a competent administrator as the head of the Judiciary: the supreme position in the Judiciary.'

¹⁹⁶ Principle 158 (3) of the Constitution states: 'Employing just and meritorious judges, dismissing and appointing them, changing their place of assignment, specifying their jobs, promotions, and similar administrative affairs, in accordance with the law.'

as mentioned above, even if the WTO dispute settlement system were a mere judicial system, its judgments could not be recognized in Iran's legal system.

The question which arises is if Iran recognizes the judgments of non-Iranian dispute settlement systems. Answering this question requires a detailed discussion. However, to answer it very briefly, Iran's Civil Code has provided some criteria to recognize foreign judgments, among which is the criteria stated in Article 972 of the Civil Code which states:

Effect cannot be given in Iran to judgments issued by foreign courts and official documents recognized as being enforceable by law in a foreign country unless an order to do so is issued in accordance with Iranian laws.¹⁹⁷

Under Article 972, if the Iranian laws adopt (recognize) a judicial system, its judgment can be recognized in Iran. In addition, Article 10 of Iran's Civil Code states: *'Treaty stipulations which have been, in accordance with the constitutional law, concluded between the Iranian Government and another government, shall have the force of law.'*¹⁹⁸ Therefore, if the Parliament adopts the protocol of Iran's accession to the WTO, the judgments (dispute settlement resolutions) under the DSS can be recognized by Iran's legal system.

Even if the Guardian Council rejects the Parliament's approval of Iran's accession, the issue can be resolved, similar to most bilateral and multilateral agreements including disputes settlement systems, in the National Expediency Council. Therefore, if under Iran's legal system, recognition of judgments by non-Muslim judges is controversial, the adoption of Iran's accession to the WTO including the Dispute Settlement Understanding by the National Expediency Council can resolve the problem and, therefore, judgments can be enforced in Iran.

¹⁹⁷ It bears considering that Iran is a party to New York Convention (1958) on the Recognition and Enforcement of Foreign Arbitral Awards. However, due to Iran's reservation to this Convention, 'it applies the Convention on the basis of reciprocity.' (Translation S.A).

¹⁹⁸ Article 10 of Iran's Civil Code, (Translation WIPO).

3.7. Conclusion

It was recognized that, to join the WTO, the legal impediments should be removed. To remove a legal impediment, it is necessary to find the best practical solution within Iran's legal system. This is because Iran has applied for accession to an existing treaty and changing the treaty may be very difficult. A solution to remove the legal impediments must be found that is compatible with Iran's laws, including Iran's Constitution. Any proposed solution that might be viable in other legal systems but disregards the main elements of Iran's system would not work or may result in other problems during or after the accession process to the WTO. Therefore, the important question is whether Iran's legal system can be easily changed to the extent that is necessary to remove the legal impediment, or the impediment to Iran's accession to the WTO can be removed through the methods offered by Iran's legal system.

It was analyzed in this chapter that, without the need of amending the current legal system of Iran, the legal conflict between Principle 139 of Iran's Constitution and the compulsory jurisdiction of the WTO dispute settlement system can be resolved. As discussed in detail, Iran has a legal system which is, to some extent, different from other legal systems. To find out about the suggested solution on the basis of Iran's legal system, the system was introduced.

The historical background including the roots and origins of the legal and constitutional system in Iran was introduced. Also, the cornerstones and elements of the mentioned system were introduced to give a better understanding of the difference between Iran's model of government and those in other constitutional systems. The theory of *Velayate Faqih* is the basis for Iran's model of government. It was this theory which formed the two main elements – 'Islamic' and 'republic' – that made Iran's system different from others in the world, even from other Islamic countries. Iran's Leader and his legal position in the Constitution – also taken from the theory of *Velayate Faqih* – were discussed to demonstrate how this position can be the keystone for suggesting some solutions later in the final chapter to remove the above-mentioned legal impediment.

The Executive, after the Leader, can play a very important role in the negotiations of Iran's accession to the WTO and later in the adoption process of the accession protocol in Iran. The President and the Board of Ministers, as it was discussed in the chapter, need to make all Iranian laws, regulations and administrative procedures fully consistent with WTO law. Regarding the legislation, the assistance of the Legislature is also required.

Iran's Legislature is composed of the 'Islamic Consultative Assembly' (Parliament) and the Guardian Council. The Parliament has the task of law making; the interpretation of laws and supervisory functions. The Parliament's authorization, through a case-by-case approval approach,¹⁹⁹ is also required for the referral of state and public property disputes to the multilateral dispute settlement systems such as the one in the WTO. This is a part of the Parliament's 'approbation supervision'. It bears mentioning that this requirement originated in Principle 139 of Iran's Constitution and is in conflict with the compulsory jurisdiction of the WTO dispute settlement system.²⁰⁰ Regarding the adoption process of Iran's protocol of accession to the WTO, after it is negotiated and adopted by the Government (Board of Ministers) it shall be submitted to the Parliament. It was discussed that according to the Constitution the constitutionality review is to be undertaken by the Guardian Council, which is a kind of constitutional court in Iran. However, the constitutionality review can also be carried out by the Parliament, and how it can be performed was discussed in the relevant section.²⁰¹

In addition to the constitutionality review, the Guardian Council is given the exclusive task to interpret the Constitution. Some of these interpretations are analyzed in chapters four and five on Iran's accession to the WTO and removing the legal impediment.

It was briefly introduced how international agreements are adopted in the Parliament. When a multilateral agreement, such as the Iran's protocol of accession, is adopted in the Parliament, it shall be sent to the Guardian

¹⁹⁹ This approach is discussed in chapters five and six.

²⁰⁰ This is discussed in chapter two, section 2.3. (Nature of the WTO Dispute Settlement System (DSS)).

²⁰¹ See chapter three, section 3.5.4. (Legislature).

Council. If the Council finds it inconsistent with the Constitution, it will be sent back to the Parliament to remove the inconsistency. This would happen regarding the WTO accession protocol because of its inconsistency with Principle 139 of Iran's Constitution. If the Parliament cannot remove the inconsistency, it would result in a conflict between the Parliament and the Guardian Council. This can also happen when the Parliament is making the domestic laws, regulations and administrative procedures consistent with the WTO law. This is due to Iran's commitment as an acceding country to amend its domestic system.²⁰² When an inconsistency with the Constitution arises and it is closely linked with the country's national interest, it is not necessary in the first place to think about amending the Constitution. Under Iran's constitutional system, such important issues can be resolved by the National Expediency Council. This Council, by its tasks conferred upon it by the Constitution, can resolve important issues between Iranian constitutional institutions using, for example, Principle 110 (8) or Principle 112. These methods and how the issues can be referred to the Council were discussed. Under Principle 110 (8), the issue shall be referred by the Leader to the National Expediency Council and the result shall be finally approved by him. This is one of the ways suggested in the concluding chapter to remove the legal impediment to Iran's accession to the WTO. Another suggested solution is the method stated in Principle 112. Under this method, the dispute between the Parliament and the Guardian Council can be referred to the National Expediency Council by the Head of the Parliament and the result does not need to be approved by the Leader. How the disputes are examined in this Council has been discussed in general in this chapter and also specifically the disputes regarding the adoption of multilateral agreements, such as the WTO protocol of accession, will be discussed in the subsequent chapter.

As was discussed in this chapter, the decisions of the National Expediency Council cannot be inconsistent with Islamic rules. If the Guardian Council finds a parliamentary approval inconsistent with the primary rules of Islam, the same issue can be adopted in the National Expediency Council on the basis of the Islamic secondary rules. In practice, none of the decisions of the

²⁰² Article XVI:4 of the WTO Agreement states: 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.'

Council on the adoption of bilateral and multilateral agreements have been temporal.

It was also discussed that the Judiciary is composed of the courts and the Justice Ministry. There are some differences and similarities between the court system in Iran and other countries. The Justice Minister is given a limited role in Iran's Judiciary. Under Iran's Constitution, however, the Head of the Judiciary plays the key role in appointing the judges and forming the courts.

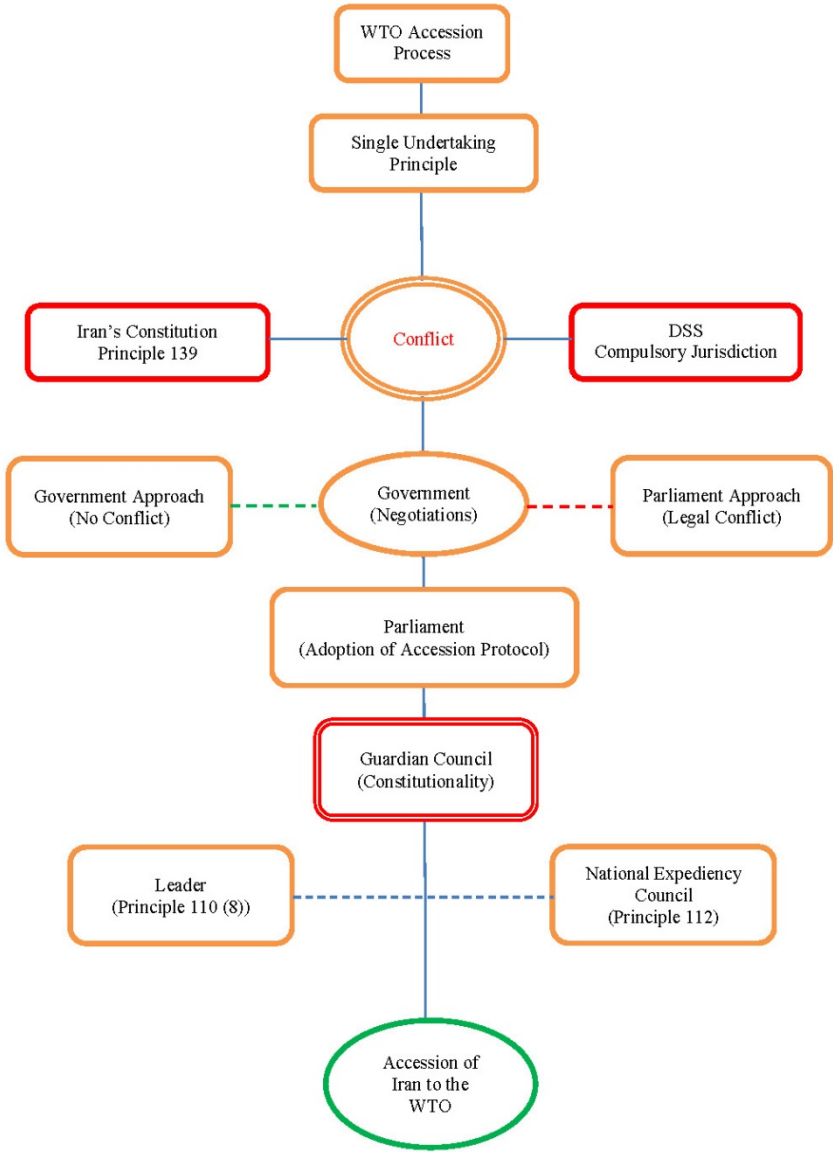
An important point here is that the WTO dispute settlement system includes some mechanisms such as the panels and Appellate Body, etc. The question is whether, under Iran's legal system, the WTO judges, who may be non-Muslim, can be recognized. The non-recognition of the judges will result in problems in relation to the enforcement of the judgments in Iran.

Under Iran's legal system, there are some specific rules on the recognition of a judge and the judgments that can even result in failing to recognize Muslim judges from other countries. If the Parliament adopts Iran's protocol of accession to the WTO, it can be sent back by the Guardian Council to the Parliament because of a conflict with the Islamic rules. However, if it is adopted by the National Expediency Council, the judges and their judgments can be also recognized by Iran's legal system.

By introducing Iran's constitutional institutions, how international agreements can be adopted is introduced in general. A detailed analysis on how Iran's adoption process of international agreements works, with a special focus on the WTO, is presented in the subsequent chapter.

To conclude, instead of amending the Constitution to remove the legal conflict identified in the previous chapters, there are some methods introduced by Iran's legal system which can be helpful. These methods will be also discussed in the final chapter.

3.8. Diagram B. Legal Impediment to Iran’s Accession to the WTO
and its Solutions



This diagram shows where the legal impediment to Iran’s accession to the WTO comes from. The adoption process of the WTO protocol of accession in Iran’s legal system and constitutional institutions and also the possible

solutions regarding the legal impediment are also demonstrated in the diagram.

Chapter 4: WTO Dispute Settlement System (DSS) and Iran's Constitution

4.1. Introduction

Iran's accession to the WTO could be blocked due to some legal impediments, one of which is discussed in this dissertation. This legal impediment is a legal conflict between Iran's Constitution and the WTO Dispute Settlement Understanding (DSU) resulting in unconstitutionality.

After discussing the WTO accession process and its dispute settlement system, the cornerstones of Iran's constitutional system were introduced in the previous chapters. Also, it was briefly mentioned in the previous chapter which of Iran's constitutional institutions are involved in the adoption process for international agreements.

In this chapter, the detailed adoption process of international agreements, with a focus on the WTO accession protocol, is presented. Regarding the adoption of multilateral agreements, Iranian Government's role in the negotiation and signature of the agreements (4.3.1 – 4.3.2), the Parliament's approval (4.3.3), the constitutionality review (4.3.4), how the unconstitutionality issues regarding multilateral agreements can be resolved (4.3.5), and the role of other constitutional authorities in accelerating the mentioned process (4.3.6) are discussed.

After that, how Iran manages the multilateral agreements, including inconsistency with Principle 139 of the Constitution, as well as some reasoning of the Guardian Council in relation to the multilateral agreements, including inconsistency with Principle 139 (4.4), are presented in this chapter.

In order to recognize how to remove the legal impediments of Iran's accession to the WTO, this chapter discusses in detail the practical experience of Iran in the adoption of multilateral agreements/accession to organizations similar to the WTO. Also, how the problems of unconstitutionality with regard to international agreements have been overcome by Iran is reviewed closely to be undertaken in similar issues which would arise in the adoption of the WTO accession protocol.

4.2. How Does Iran Manage Negotiations and Accession to Multilateral Agreements?

After the adoption of the accession protocol by the WTO, the protocol will be adopted by Iran's domestic constitutional system in accordance with the rules governing the international agreement. This adoption process is introduced in this chapter to present what factors and institutions are involved in finalizing the adoption of international agreements, such as Iran's protocol of accession to the WTO.

With the evolution of international and multilateral organizations in the twentieth century, the number of transnational agreements has increased considerably. Other factors which have contributed to this trend are the increasing number of new countries and international, regional and even non-governmental organizations in recent decades. That is why, so far, over 500 multilateral agreements on various subjects have been concluded.

There are no mandatory detailed and comprehensive rules governing the treaty-making process. Yet, some law-making treaties, such as the Vienna Convention on the Law of Treaties (VCLT 1969) have been taken into account by countries and international organization when concluding international agreements. Such important law-making treaties generally include rules related to the post-adoption phase of the international agreements including the 'general rules of interpretation',¹ which also cover the WTO agreements.

At the national level, there are also rules and formalities governing the adoption process of international agreements including rules on negotiations, signatures, adoption, and the entry into force of the agreements. These rules usually have two legal effects in the agreement-making process: an international and national effect. At the international level, the legal competence of the delegates is recognized and therefore the full powers of the negotiators will be evaluated. At the national level, the mentioned rules determine how an agreement which is negotiated/signed can become legally binding for the country. That is to say, these rules govern the treaty/agreement-making process from the beginning to the end.

¹ Articles 31, 32 and 33 of VCLT (1969), <https://treaties.un.org>, last visited on 1-10-2016.

For a better understanding of the international agreement-making process, the difference between international, multilateral, bilateral, and plurilateral agreements should be clarified. The term 'treaty', which is usually used for most international instruments is defined by Article 2 (1)(a) of the VCLT (1969) as follows:

"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.²

According to the above definition of the VLCT, under international law the term treaty is a generic word and can include agreements that are concluded between two or more international juridical persons.³ A treaty can take the form of an international agreement and is governed by international law. International agreements can take the form of multilateral agreements. However, there are some multilateral agreements which are not international treaties.⁴ This is because they can be governed by more specific rules of international law, such as world trade law. Although international agreements and treaties are usually open to all countries, multilateral agreements can be restricted to a specific group of countries and sometimes they can include members/parties such as separate economy territories,⁵ which are not similar to traditional subjects of international law.⁶ Multilateral agreements are concluded between three or more parties. It bears mentioning that, similar to

² Vienna Convention on the Law of Treaties, 23 May 1969, Signatories: 45 and Parties: 114.

³ Definition of a treaty which is stated in United Nations Treaty Handbook: United Nations, "Treaty Handbook", (United Nations Publication, 2012) available at <https://treaties.un.org/doc/source/publications/THB/English.pdf>, last visited on 1-10-2016.

⁴ Some multilateral agreements are limited to specific members and there are some rules and qualifications which shall be followed by acceding countries to join the agreement.

⁵ Article XII:1 of the WTO Agreement states that 'any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations' can accede to the WTO agreements.

⁶ The traditional subjects of international law are countries and international organizations.

the characteristics stated for the multilateral agreements, a bilateral agreement can also be considered to be an international treaty.

As Iran's treaty adoption process is the core interest of this section, the definitions in Iran's legal system for multilateral agreements should also be taken into consideration.

- Legal and Moral Agreements

Article 1 of the '*Regulation on How to Draft and Conclude International Agreements* (29 May 1992)' ⁷ defines the terms which are stated in the Regulation. Even though several terms have been defined in Article 1 of the Regulation, there are two main groups of agreements which are: moral (1) and legal (2) agreements.

4.2.1. Moral Agreements

Under Article 1 of the Regulation, a moral agreement is an agreement resulting from international relations whereby the governmental institution declares its decision to pursue specific policies without being legally binding.

4.2.2. Legal agreement

A legal agreement is defined as an agreement resulting from international relations whereby a governmental entity, in relation to a government, an institution, a state-owned company or international assemblies, councils and organizations, is committed to do something and accept legal consequences and enforcement obligations. If a legal agreement requires the Parliament's approval, it is a 'formal legal agreement'; otherwise it is a 'simple legal agreement'. ⁸

Also Article 7 of the Regulation states what agreements should be drafted and approved as formal legal agreements:

⁷ [آیین نامه چگونگی تنظیم و انعقاد توافق های بین المللی] (Translation S.A).

⁸ Article 1 of '*Regulation on How to Draft and Conclude International Agreements* (29 May 1992)', Legal Division of Presidency, *Indexing the Laws on Formal Legal Agreements* [فهرست قوانین توافقیهای حقوقی تشریفاتی] (Legal Division of Presidency, 2013), p. 12.

- A. Border delimitation, border dispute resolutions, peace resolutions and disputes with governments;
- B. Treaty of Amity on economic, social, trade, cultural, scientific and technical cooperation and interaction;
- C. International multilateral agreements which are concluded under a framework or the supervision of international organizations, assemblies and unions;
- D. Stating rules, enforcement, extension, completion, interpretation or amendment conditions of other formal legal agreements;
- E. Binding bilateral or multilateral regional or international political-military or defense issues;
- F. Establishment of or accession to international unions, assemblies and organizations;
- G. International Labor Organization Conference decisions.⁹

It bears mentioning that it is stated in Article 7 that if a formal legal multilateral agreement has a different name (title) and is not consistent with the above-mentioned criteria, its approval shall be authorized under different rules.¹⁰

In the following section, it is discussed whether under Iran's legal system accession to the multilateral agreements such as the WTO need a special formal process.

4.3. What is Iran's Adoption Process of Accession to Multilateral Agreements such as the WTO?

After some general international and domestic terms on the treaty adoption process were introduced, Iran's domestic rules on the adoption process of multilateral agreements are presented.

⁹ (Translation S.A).

¹⁰ Article 7 of '*Regulation on How to Draft and Conclude International Agreements* (29 May 1992)', Legal Division of Presidency (2013), pp. 14-15.

As discussed before, there are no detailed binding rules in international law for the negotiation and conclusion of international agreements. However, some general rules have been codified from customary international law¹¹ and are stated in international conventions such as the VLCT (1969).¹² In addition, there are some organizations which have collected special rules to be followed by the acceding countries to the covered agreements, among which is the World Trade Organization. As mentioned in chapter one on WTO accession (1.2. General Information on Accession to the WTO), the WTO secretariat has drawn up a set of non-binding procedures to be followed during the accession process based on experience gathered in the GATT and the WTO accession working parties.¹³ Each accession process is unique, because each acceding government negotiates its own unique concessions on customs duties, commitments on agricultural support and export subsidies, and specific commitments on its services regime on the basis of its national measures.¹⁴

Under international law, there are some means of expressing consent to be bound by an international agreement. Article 11 of VCLT (1969) states:

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.¹⁵

Even though the consent of a state to be bound by an agreement is expressed through one of the means stated in Article 11 of the VCLT, how a state expresses its consent is pursuant to the procedures stated in the domestic legal system of each contracting/original or acceding country. In Iran there are some principal rules stated in its Constitution which shall be observed to make this country bound by multilateral agreements. Also, some laws and

¹¹ See the Preamble of VCLT.

¹² As mentioned earlier, some more detailed non-binding guidelines have been collected and published by the United Nations Treaty Section of the Office of Legal Affairs titled as: Treaty Handbook, Treaty Section of the Office of Legal Affairs (2012).

¹³ WTO Technical Note on the Accession process, Note by the Secretariat, WT/ACC/10/Rev.4.

¹⁴ P.J. Williams, *A Handbook on Accession to the WTO*, 1st ed., 1 vols., vol. 1 (Cambridge, 2008), p. 48.

¹⁵ Article 11 of VCLT (1969), <https://treaties.un.org>, last visited on 1-10-2016.

regulations have been adopted to be followed by the constitutional institutions, including the Government and the Parliament, for the negotiation and approval of multilateral agreements. For instance, Article 9 of Iran's Civil Code gives treaties between the Iranian government and other governments a similar legal position as legislation approved by the Parliament. However, the legal position for governmental contracts is conditional on observing the rules of the Constitution. Article 9 of the Civil Code states:

Treaty stipulations which have been, in accordance with the constitutional law, concluded between Iranian Government and other government(s), shall have the force of law.¹⁶

Therefore, under this article of the Civil Code, Iran has recognized a dualist system which means that, after an international agreement is adopted on the basis of constitutional law (adopted by the Parliament), it results in legally binding domestic legislation.

Article 9 also addresses the constitutional law requirement. Under Article 9, contracts between the Iranian Government and other governments can be recognized if the relevant rules of the Constitution on the treaty-making process are observed. Therefore, the important question is whether Iran's Constitution includes any rules/requirements to address the adoption process of international contracts and agreements.

Iran's constitutional law on the treaty adoption process is presented in two groups which are constitutional law requirements (A) and domestic laws and regulations (B). Each one is discussed below.

4.3.1. Constitutional Law Requirements

There are several rules stated in the Constitution on the substance (1) and the form and procedure (2) for the adoption of international agreements which shall be observed in the adoption process to be legally binding upon Iran. Each one is presented below.

¹⁶ Article 9 of Iran's Civil Code,
(Translation WIPO: http://www.wipo.int/wipolex/en/text.jsp?file_id=197898).

4.3.1.2. Constitutional Substantial Requirements

Regarding the substance of the agreements, for instance, under the Constitution,¹⁷ Iran's foreign policy shall be on the basis of:

- the rejection of any kind of domination, both its exercise and submission to it;
- the preservation of the all-inclusive independence of the country and its territorial integrity;
- the defense of the rights of all Muslims;
- non-alignment in relation to the domineering powers;
- mutual peaceful relations with non-aggressive states.

Therefore, if the concluded agreements are inconsistent with the above-mentioned policies, they cannot be legally recognized in the Iran.

Also, Principle 153 of the Constitution rejects any form of agreement which would result in:

- foreign domination over the natural and economic resources;
- foreign domination over culture, the army, and other affairs of the country.

(A) Constitutional procedural rules

In addition to the substantial requirements, there are important requirements stated by the Constitution including rules concerning public and government property agreements and the non-judicial dispute settlement system. Principle 139 indirectly provides that the mentioned agreements are subject to the Governmental and Parliamentary approvals. Otherwise, the disputes on public and state property cannot be referred to non-judicial dispute settlement systems.

Another procedural requirement that is stated in two Principles of the Constitution¹⁸ provides that all governmental legal agreements are subject to the approval of the Parliament. Principle 77 of Iran's Constitution states:

¹⁷ See Principle 152 of Iran's Constitution, (Translation The International Society for Iranian Studies), <http://www.wipo.int/edocs/lexdocs/laws/en/ir/irooten.pdf>.

¹⁸ Principles 77 and 177 of Iran's Constitution.

Treaties, transactions, contracts, and all international agreements must be ratified by the Islamic Consultative Assembly.¹⁹

Regarding the international agreements, Principle 77 requires the ratification of the Islamic Consultative Assembly, which is the Parliament of Iran.

Hashemi believes that the severity of the Constitution (on agreements) can be explained by political reasons and the experience of harmful contracts which were concluded several times under the previous regime (before the Islamic Revolution (1979)) and therefore the Constitution drafters were wary of these issues.²⁰

In practice, the implementation of Principle 77 of the Constitution resulted in some difficulties, for instance in oil contracts.²¹ That is why the Guardian Council²² has issued some interpretations on Principle 77.

According to some of the interpretations issued by the Guardian Council, there are two factors which cause an agreement to fall within the scope of Principle 77:

1. the international agreement is between the subjects of international law. This excludes any private law agreements;²³
2. the agreement places commitments upon the government. Non-legally binding agreements thus do not fall within the ambit of Principle 77.²⁴

There is also another Principle in the Constitution which is similar to Principle 77. Under Principle 125 of the Constitution:

¹⁹ Principle 77 of Iran's Constitution.

²⁰ S.M. Hashemi, *The Constitutional Law of Islamic Republic of Iran* [حقوق اساسی جمهوری اسلامی ایران] 23, third ed., vol. 2 (Mizan Publications, 2012), p. 184.

²¹ Even though oil contracts are concluded by the Government, they are not governmental contracts and should be subject to rules governing private contracts.

²² The "Guardian Council" (which acts almost as a constitutional court) and its tasks are introduced in 3.5.4.2. Guardian Council of this research.

²³ Guardian Council interpretation opinion no 3903 issued on 29 October 1981, (Translation S.A), see the Guardian Council website at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

²⁴ Guardian Council interpretation opinion no 9993 issued on 29 November 1983, (Translation S.A), see the Guardian Council website.

All the treaties, transactions, agreements, and contracts between the Government of Iran and other governments as well as all the pacts related to the international unions, after they are approved by the Islamic Consultative Assembly, must be signed by the President of the Republic or his legal representative.²⁵

Under another interpretation issued by the Guardian Council,²⁶ the subject matter of Principles 77 and 125 is the same and Principle 177 has not added any extra requirements to Principle 77 on international agreements.

To implement the constitutional requirements when concluding international agreements, there are also some domestic laws and regulations to be observed.

(B) Other laws and regulations

In addition to substantial and procedural rules which are stated in the Constitution, there are also several laws and regulations that have been approved by the Parliament and the Government (Board of Ministers), some of which are as follows:

- 'Regulation on How to Draft and Conclude International Agreements' which was approved by the Board of Ministers on 29 May 1992;
- Article 173-177 of the Parliament's Rules of Procedure which was approved by the Parliament;
- Articles 2, 3 and 5 of the 'Foreign Affairs Ministry's Tasks Act' which was approved by the Parliament on 9 April 1985;
- 'Membership of the Islamic Republic of Iran in International Assemblies and Organizations Act' (15 April 1986);
- 'Instruction on How to Draft International Legal Agreements' (10 December 2011).

The above-mentioned domestic rules, as a whole, have formed the rules governing international agreements making/adoption process to be observed by Iran's constitutional institutions. That is to say that there are some detailed

²⁵ Principle 125 of Iran's Constitution.

²⁶ Guardian Council interpretation opinion no 9781 issued on 25 October 1983, (Translation S.A), see the Guardian Council website.

rules on how Iran's Government should deal with bilateral and multilateral agreements. To recognize whether accession to multilateral agreements is subject to the mentioned rules, they should be examined, including the rules on accession to multilateral organizations which are discussed below.

Article 7(F) of the 'Regulation on How to Draft and Conclude International Agreements' states that the '*establishment of or accession to international unions, assemblies and organizations*'²⁷ is taken by Iran's legal system as a kind of 'formal legal agreement' and therefore needs to be approved by the Parliament. Accordingly, accession of Iran to the World Trade Organization needs to be adopted by Iran's Parliament. The question that arises here is what specific rules govern Iran's accession process to the WTO which enables Iran to negotiate bilateral and multilateral agreements and to agree on accession terms between it and the WTO Members²⁸ until its protocol of accession is adopted in the WTO. Thereafter this protocol has to be ratified in Iran's legal system and finally WTO membership will be achieved.

To clarify Iran's rules on the accession process, there are several phases which should be followed to achieve its accession. These phases are discussed below.

- Negotiation and Signature by the Government (4.3.2)
- The Parliament's Approval in the Accession Process (4.3.3)
- Who Checks the Constitutionality in the Accession Process (The Guardian Council role) (4.3.4)
- The Role of the National Expediency Council in the Accession Process (when it is inconsistent with the Constitution) (4.3.5)
- The Leader's Role in the Accession Process (A solution to remove the inconsistency with the Constitution) (4.3.6)

²⁷ (Translation S.A).

²⁸ Article XII:1 of the WTO Agreement states: 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.'

4.3.2. Negotiation and Signature by the Government

Some general information was given on the rules governing Iran's Government when dealing with accession to multilateral agreements such as the WTO. In this section it is discussed in detail what domestic rules shall be observed in relation to the accession of Iran to multilateral agreements.

Under the VLCT (1969), a state expresses its consent to be bound by a treaty usually through definitive signature, ratification, acceptance, approval, or accession.²⁹ The agreement adoption process under Iran's legal system includes full powers (A), Requirements for the Governments' approval (B), simple signature (C), governmental bill (D), the President's signature (E), instances (F), other involved constitutional authorities (G), and WTO accession focus (H). Each one is presented below.

4.3.2.1. Full Powers

Before discussing Iran's domestic rules on the signature and negotiation of international agreements, the standard rules of international law on full powers, which is also required to be observed by Iran, are discussed below.

To participate in a treaty making process, the representative should first have full powers. Article 2(C) of the VCLT(1969) defines full powers as:

"Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.³⁰

Article 2(C) states that full powers represent the consent of a state regarding the conduct of its delegate in a treaty-making process. However, under Article 7(2) of the VCLT (1969), there are some representatives who do not need to present full powers in the treaty-making process which are:

- Heads of state;

²⁹ Articles 11-18 Vienna Convention 1969.

³⁰ Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969, <https://treaties.un.org>, last visited on 1-10-2016.

- Heads of government;
- The Minister of Foreign Affairs.³¹

Therefore, in Iran, the Leader, who is the highest official of the country,³² the President and the Minister of Foreign Affairs do not need to present full powers. According to the full powers guidelines issued by the treaty section of the United Nations office of legal affairs, full powers should be signed by the head of state, head of government, Minister for Foreign Affairs, or a person acting, *ad interim*, in one of the above-mentioned positions.³³

Under Iran's laws and regulations, an authorization to negotiate or sign international agreements shall be issued in coordination with the Foreign Affairs Ministry and the Legal Vice President (International Agreements Division) by the Board of Ministers.³⁴ It can be controversial which governmental institution should be authorized to negotiate an international agreement. As it is also emphasized by Iran's laws that logically the 'relevant' governmental institutions should be authorized. Sometimes an international agreement is relevant to tasks of several ministries and governmental institutions or to several governmental and judicial (non-executive) organizations. This was an issue in relation to intellectual property conventions between the Organization for Registration of Deeds and Properties (Industrial Property Office) which is a part of the Judiciary, and the Ministry of Justice, as well as the Ministry of Culture and Islamic Guidance (Intellectual Property Office).³⁵ The solution that the Instruction on How to

³¹ Article 7(2) of the Vienna Convention 1969.

³² Principle 113 of Iran's Constitution states: 'After the leadership, the President of the Republic is the highest official of the country. He is responsible for executing the constitution and heading the Executive, except in instances that are directly related to the leadership.'

³³ Treaty Handbook (2012), p. 48.

³⁴ Article 5 of Instruction on How to Draft International Legal Agreements (2011), Articles 2 and 17 of the Regulation on How to Draft and Conclude International (1992) and Article 3 of the Foreign Affairs Ministry's Tasks Act (1985).

³⁵ The problem was (almost) resolved through the Board of Ministers' approval on 07 May 2007 which established a Committee including several ministries and organizations including the Ministry of Culture and Islamic Guidance, as well as the Organization for Registration of Deeds and Properties. This Committee is chaired by

Draft International Legal Agreements (2011) has provided on bilateral agreements can solve the problem when only governmental institutions are involved. Article 14 of the Instruction states:

In case the subject of the formal legal agreement is within the scope of tasks and responsibilities of several governmental institutions, each one of the mentioned institutions is responsible for the implementation of the relevant part and the coordination among the institutions will be upon the (highest) governmental institution that is determined by the Board of Ministers.³⁶

Therefore, under Article 14, the Board of Ministers determines which governmental institution is authorized to participate in the negotiation process. However, due to the lacuna in the Constitution,³⁷ and according to the separation of powers rule,³⁸ the Board of Ministers cannot limit the organizations under the control of the Judiciary where an international agreement is relevant to their tasks and responsibilities. This requires a more detailed discussion, which is beyond the limited scope of this research.

In addition to the full powers requirement, there are other requirements and tasks which should be taken under consideration by the relevant organization in the adoption process of an agreement.

4.3.2.2. Requirements for the Government's Approval

Under Iran's legal system, before approving, accepting, or joining multilateral agreements, there are some requirements which shall be complied with.

the Ministry of Justice and its Secretariat is located at the Organization for Registration of Deeds and Properties.

³⁶ Article 14 of the Instruction on How to Draft International Legal Agreements (2011), (Translation S.A).

³⁷ No exception is recognized on the separation of powers rule by Iran's Constitution. This means that the Government cannot decide for non-executive entities such as the Judiciary and Legislature. Therefore, when an international agreement is within the scope of tasks and responsibilities of several executive and non-executive entities, it is inconsistent with the separation of powers rule that the Board of Ministers (the Executive) determines which governmental institution is authorized to participate in the negotiations process.

³⁸ The separation of powers rule is stated in Principle 57 of Iran's Constitution.

(1) The first requirement is to carry out some studies to find out the real outcome of the membership for the country. Article 16(a) of the Instruction on How to Draft International Legal Agreements (2011) provides that '*necessary studies regarding the benefits and formalities of joining and its consequences*' shall be done by the relevant governmental institutions.³⁹

(2) The second requirement under Article 16(b) of the Instruction is to submit a proposal as well as a briefing report to the International Agreement Division of the Legal Vice President and to the Foreign Affairs Ministry. This report should include the following subjects:

- the title of the multilateral agreement;
- the principal and subsidiary subjects of the agreement;
- the commitments (obligations) arising from ratification, adoption, authentication or accession;
- conditions and the date of enforcement;
- the names of the acceded countries;
- benefits and disadvantages of adoption or accession;
- determining the reservations (if necessary).

(3) The third requirement is to coordinate with the Legal Vice President and the Foreign Affairs Ministry regarding whether to formulate a reservation or not.⁴⁰ More detailed discussions on reservations are introduced later in this chapter in sections 4.4.3. (How Can the Conflict with Principle 139 be Resolved?) and 4.4.4. (Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?).

(4) The fourth requirement is the language. Article 3 of the Regulation provides that the multilateral agreement shall also be written in Farsi. In addition, for interpretation, the validity and equality of Farsi and other languages of the agreement shall be clarified. Under Article 4 of the Regulation, before adopting any international formal legal agreement, the Farsi document (translation) shall be compared to and verified against the

³⁹ Article 16(a) of the Instruction on How to Draft International Legal Agreements (2011), (Translation S.A).

⁴⁰ See Article 16(c) of the Instruction on How to Draft International Legal Agreements (2011), (Translation S.A).

non-Persian language versions by the 'Translation Division' of the Legal Vice President.

(5) The fifth requirement concerns the dispute settlement mechanism. Under Article 5 of the Regulation, in each legal agreement, the mechanism for resolving the disputes on the interpretation or implementation shall be stated in the text. If the foreign party(ies) of the agreement accept(s), the Iranian courts and dispute settlement systems should be taken as the competent authority, otherwise, an international law or international professional or formal foreign authority will be agreed upon.

(6) The sixth requirement concerns signing a multilateral agreement. If it is not stated by the agreement that the adoption is subject to the ratification by domestic authorities, this requirement shall be stated (by Iran) in the signature place.⁴¹

There are thus six requirements which shall be observed when acceding to multilateral agreements. When the negotiations are finalized and the international agreement is concluded, the agreement should be signed. This phase is discussed below.

4.3.2.3. Simple Signature

Iran's protocol of accession to the WTO should first be signed by Iran's delegate who has the full powers from the Government. This is called 'simple signature'. Simple signature means that the consent of a country to be bound by a treaty is subject to ratification. However, a 'definitive signature' occurs when a state expresses its consent to be bound by an agreement through signing without the need for ratification, acceptance or approval.⁴²

Under Iran's law, the simple signature, which is called 'temporary signature', can be done by the authority that is authorized by the Board of Ministers. So far, the Ministry of Commerce has been in charge of managing the process of

⁴¹ Article 14(b) of the Instruction on How to Draft International Legal Agreements (2011).

⁴² See Treaty Handbook (2012), p. 71.

accession to the WTO.⁴³ Therefore, this Ministry has full powers to negotiate the accession process and sign the accession protocol.

The question that arises during the accession process (before the adoption of the protocol by the WTO General Council) is whether the results of bilateral and multilateral negotiations need any pre-approval/authorization from Iran's Parliament. This is important because, under Iran's legal system, the simple or temporary signature of the international agreements by the Government can be binding only if they are ratified by the Parliament.

To answer this question, under the interpretation issued by the Guardian Council on Principles 77 and 125 of the Constitution, *'the Parliament's approval which makes the international treaty official (binding) is subsequent to the conclusion of the treaty.'*⁴⁴ Accordingly, first the multilateral and bilateral negotiations should be finalized and the protocol of accession should be adopted by the WTO (General Council). Then it will be submitted to Iran's Parliament for ratification. Under the 'single undertaking rule', which is discussed in chapter one,⁴⁵ Iran's Parliament can accept or reject the whole accession protocol including the bilateral and multilateral agreements. Therefore, the Parliament neither can intervene when the Government is negotiating the bilateral and multilateral agreements regarding the accession process, nor can it reject some parts of the accession protocol after it is signed by the Government.

It bears mentioning that under Article 17 of the Instruction, to sign the multilateral agreement including the WTO accession protocol, coordination between the relevant institution (Ministry of Commerce for the WTO) and the Foreign Affairs Ministry, as well as an authorization from the Board of Ministers, are required. As it is mentioned in Iran's Memorandum on its foreign trade regime to the WTO,⁴⁶ the Foreign Affairs Ministry also takes

⁴³ The Memorandum of the Foreign Trade Regime of the Islamic Republic of Iran, 2009, p.40.

⁴⁴ Guardian Council interpretation opinion no 9781 issued on 25 October 1983, (Translation S.A), see the Guardian Council website.

⁴⁵ See chapter one, section 1.4.2. (Single Undertaking Principle).

⁴⁶ WTO document: WT/ACC/IRN/3, para. A2, p. 31.

the appropriate strategies to facilitate Iran's accession to the WTO.⁴⁷ Also, after the protocol is signed and approved by local authorities, the exchange of letters and notes, and the depositary of agreement (protocol) to the Secretary General of the United Nations or the WTO Secretariat are usually performed by the Foreign Affairs Ministry.⁴⁸

4.3.2.4. Governmental Bill

When the multilateral agreement (protocol of accession for the WTO accession) is signed by the relevant authority (Commerce Ministry), it shall be submitted to the Government in the form of a bill.⁴⁹ This bill will first be checked by the legal Vice-President office. Then it will be discussed in the meeting of the Board of Ministers.⁵⁰ If the bill is adopted by the Board of Ministers, then, it shall be submitted to the Parliament.⁵¹ The process of approval in the Parliament is discussed in the following section. After the Parliament's adoption of the agreement, a final signature by the President is also required to finalize the adoption process.

4.3.2.5. President's Signature

After a multilateral agreement such as the protocol of accession to the WTO is adopted by the Parliament, under Principle 125 of the Constitution, it needs to be signed by the President or his delegate to be binding.⁵² After a treaty is ratified by the Parliament and signed by the President, its documents should be deposited with the relevant Secretariat. Under Article 21 of the Instruction, when Iran is bound by a treaty, the relevant authority shall provide legal grounds for the implementation of commitments.⁵³ For a better understanding of the treaty adoption process in the Government, some instances are presented below.

⁴⁷ The Memorandum of the Foreign Trade Regime of the I. R. of, 2009, p.41, WTO document: WT/ACC/IRN/3.

⁴⁸ Under Article 13(b) of the Regulation, after a multilateral legal agreement is approved (by the domestic authorities), all accession and approval documents shall be submitted to the Foreign Affairs Ministry. This Ministry will perform the depositary.

⁴⁹ Article 10 of the Regulation.

⁵⁰ Ibid.

⁵¹ Article 11 of the Regulation.

⁵² Principle 125 of the Constitution and Article 11 of the Regulation.

⁵³ Article 21 of the Instruction.

4.3.2.6. *Instances*

There are many international agreements which have passed through Iran's treaty adoption process in the Government. Two of those are discussed below:

(A) Multilateral agreement

The first example concerns the authorization that was issued in 2006 by the Government for the Commerce Ministry to negotiate and sign a multilateral agreement which is: the *Preferential Trade Agreement among D-8 Member States*.⁵⁴ This authorization provides:

On the basis of the Ministry of Commerce's proposal no 1797/1 dated 11 April 2006, and in implementation of Article 2 of the Regulation on How to Draft and Conclude International Agreements (1992), the Board of Ministers in its meeting on 10 May 2006 approved that:

The Ministry of Commerce is authorized to perform the temporary signature of the *Preferential Trade Agreement among D-8 Member States* within the framework of the annexed text which is stamped by the Board of Ministers office, and to follow the legal processes until it is finalized.⁵⁵

Through this Governmental decision, the Ministry of Commerce was authorized to negotiate and sign the above-mentioned agreement.

(B) Bilateral agreement

The second example relates to an authorization for a bilateral agreement. In 2006 an authorization was issued by the Government to negotiate and sign a

⁵⁴ The D-8, also known as Developing-8, is an organization for development cooperation among the following countries: Bangladesh, Egypt, Indonesia, Iran, Malaysia, Nigeria, Pakistan and Turkey. The establishment of D-8 was announced officially through the Istanbul Declaration of Summit of Heads of State/Government on June 15, 1997. For further information see the website of the D-8 organization at: <http://www.developing8.org>, last visited on 1-10-2016.

⁵⁵ (Translation S.A), for further information see the website of Research Centre of Iran's Parliament at: <http://rc.majlis.ir>, last visited on 1-10-2016.

bilateral preferential trade agreement between Iran and Indonesia. The authorization states:

On the basis of the Ministry of Commerce's proposal no 49489/25/3 dated 5 November 2006, and in the implementation of Article 2 of the Regulation on How to Draft and Conclude International Agreements (1992), the Board of Ministers in its meeting on 26 November 2006 approved that:

The Ministry of Commerce is authorized to perform the temporary signature of the *Preferential Trade Agreement between the Islamic Republic of Iran and the Government of Republic of Indonesia* within the model text subject to the letter no.79542 dated 19 March 2006 of the Legal Vice-President Office to the Commerce Ministry, and to follow the legal processes until its final approval.⁵⁶

This governmental decision was based on Article 2 of the Regulation and authorized the negotiations and subsequent signing of the above-mentioned bilateral agreement.

In addition to the required elements of the treaty adoption process in the Government, there are some important points that should be taken into consideration as discussed below.

4.3.2.7. Other Constitutional Authorities Involved

In addition to the Board of Ministers authorizing the negotiation of bilateral and multilateral agreements or accession to international organizations, there are some other constitutional authorities which can be involved. For instance, if an agreement is directly relevant to the tasks of the Supreme Council for National Security,⁵⁷ It should be also checked by this Council. In some

⁵⁶ (Translation S.A), for further information see *ibid*.

⁵⁷ The Supreme Council for National Security is a constitutional institution. According to Principle 176 of Iran's Constitution, the Council is formed to safeguard the national interests and also to preserve the Islamic Revolution, the territorial integrity and the national sovereignty of Iran. The Council is chaired by the President and the Secretary should be appointed by the President. Under the Constitution, the tasks of the Council are: determining the defense and national security policies within the framework of general policies determined by the Leader; coordination of activities in the areas

important cases, the negotiation or accession can only be authorized by the Leader. For instance, to authorize the negotiations of 'the agreement between Iran and the group of five plus one countries on resolving the nuclear issues', the Supreme Council and the Leader were also involved.

Also, with regard to arbitration between Iran and Israel on disputes which originated from an agreement⁵⁸ concluded before Iran's Islamic Revolution of 1979, due to the lack of bilateral diplomatic relations, the Leader authorized the negotiations and arbitration. Therefore, when the Iranian Government is going to negotiate an agreement with a country with which it does not have political relations, an authorization can be issued by the Leader or the Supreme Council for National Security.

In case an agreement or organization is very important and needs some considerable reform of the laws, regulations and administrative procedures, an authorization from the Leader can accelerate the approval or accession process. That is why on 28 February 1996 Iran's Leader issued an authorization for Iran's Government to start the WTO accession negotiations.

Another important issue which should be discussed is whether under Iran's Constitution Principles 77 and 125, and also the relevant laws and regulations, the authorization for the negotiation and signature of international agreements shall be issued by the Government (the Board of Ministers) and how can the interventions of Leader or other constitutional institution be accepted in Iran's legal system?

To answer to this question, as discussed in chapter three of this dissertation, due to the theory of *Velayate Faqih*, which is the cornerstone of Iran's

relating to politics, intelligence, social, cultural and economic fields in regard to general defense and security policies; and, exploitation of materialistic and intellectual resources of the country for facing the internal and external threats.

⁵⁸ On February 29, 1968, Israel and NIOC entered into a "Participation Agreement" for the construction, use and maintenance of an oil-pipeline on the territory of Israel. After the Revolution the relation between the two countries collapsed. On 14 October 1994, NIOC initiated arbitration proceedings against Israel.

constitutional system, the Leader possesses a kind of absolute power.⁵⁹ In addition, apart from Principle 113 of the Constitution that recognizes the Leader as the highest Executive position in Iran, the authorization of the Leader is requested when a normal authorization from the Government does not work. An authorization from the Leader or the Supreme Council for National Security can open possibilities which cannot be accessed with a normal authorization from the Government. If achieved, this special authorization, as a key player, not only can facilitate the accession process, but it can also remove the legal impediments which can block the final approval or accession of Iran with regard to some international agreements. That is why, in my opinion, the Government requested an authorization from the Leader to start the negotiation process for accession to the WTO, which can hopefully result in further authorizations on the removal of the legal impediments such as the one which is discussed in this dissertation.

What has been performed by Iran to submit its accession application to the WTO is presented below.

4.3.2.8. WTO Accession Focus

Regarding the accession of Iran to the WTO, some studies have been undertaken. These were discussed in chapter one.⁶⁰ Before the WTO was established, Iran undertook its studies on accession to the GATT. After the WTO was established, the studies changed focus to accession to the WTO. The studies performed, as well as the required authorizations which were issued before Iran applied for accession to the WTO are outlined as follows:

- In April 1991 Iran's Government requested the Ministry of Commerce to undertake the necessary studies on accession to the GATT;
- May 1993 the initial report was submitted to the Board of Ministers by the Minister of Commerce;
- On 17 January 1994, the Board of Ministers formed a committee at the Ministry of Commerce which was composed of delegates from 21

⁵⁹ This absolute power is also stated in Principle 57 of Iran's Constitution. For further information see chapter three, section 3.5.1 The Leader (Absolute power theory under Principle 57).

⁶⁰ See chapter one, section 1.3.2. (Iran's WTO Accession Process).

ministries and governmental institutions to evaluate what 'accession' to the GATT would entail for Iran;

- In 1995, after the WTO was established, the Committee changed its focus to the WTO and Iran's accession to this organization. The studies undertaken by the Ministry of Commerce concluded that Iran should commence WTO accession negotiations;
- On 28 February 1996 Iran's Leader authorized the WTO accession negotiation;
- On 5 May 1996, it was agreed by Iran's Board of Ministers that the application for WTO accession should be sent to the WTO;
- On 22 June 1996 the Deputy Minister of Commerce on planning was introduced by the Minister of Commerce to the Board of Ministers to be appointed as Iran's delegate to the WTO;
- The WTO accession application was formally submitted to the WTO Director General and was filed on 26 September 1996 (WT/ACC/IRN/1).

Accession to the WTO shall be done through the WTO accession process. Therefore, to join the WTO, Iran should negotiate bilateral, multilateral and plurilateral agreements with the WTO Members (Working Party). After the accession process is completed, to finalize the accession, its protocol should first be adopted by the WTO General Council and then by Iran's Government and finally by the Parliament. What has been done so far by Iran in its accession process to the WTO was presented in detail in chapter one.⁶¹

When the international agreements, such as the WTO protocol of accession, are adopted by the Government, they shall be submitted to the Parliament. This phase of the treaty adoption process in Iran is discussed in the subsequent section.

4.3.3. Parliament's Approval in the Accession Process

How Iran's Parliament deals with multilateral agreements (the protocol of accession) is discussed under following sub-sections: Introduction (A), Agreement adoption phases in the Parliament (B), Constitutionality by the Parliament (C), Other authorities in the adoption process (D), Fast reading

⁶¹ See chapter one, section 1.2. (General Information on Accession to the WTO).

discussion in the Parliament for model agreements (E), Instances of adopted agreements in the Parliament (F), WTO accession focus in the Parliament (G).

4.3.3.1. Introduction

After an international agreement is negotiated and concluded, it is signed and sent to the Government by the relevant organization. To submit a bill of an international agreement to the Parliament, it first should be adopted by the Government. Principles 77 and 125 of the Constitution do not require the international agreements to be approved by the Government. However, the practice of the Parliament, as stated in its Rules of Procedure, requires that international agreements should be submitted in the form of a bill to the Parliament.⁶² Also, the bills under Principle 74 of the Constitution shall first be adopted by the Government (Board of Ministers). Therefore, the Parliament believes that an international agreement cannot be submitted directly to the Parliament after it is signed and concluded by the Government. This also includes agreements which are concluded by the Parliament, the Judiciary or other non-executive organizations. That is why legal and judicial agreements, such as extradition and legal assistance in civil and criminal matters agreements, are signed by the Justice Minister (on behalf of the Judiciary) and should be approved by the Government to be submitted to the Parliament.⁶³

Under international rules, the concluded agreements should be signed and then ratified by the countries. Therefore, first the Government authorizes the signing of the agreement. Then, after signing the agreement shall be adopted as a bill by the Government to be able to be submitted to the Parliament. Thus, signature and post-signature adoption are two different phases in Iran's treaty adoption process. It can also be said that there are three phases: issuing full powers for negotiations (1); signature (2); and adoption as a bill (3).

⁶² Article 173 of the Parliament's Rules of Procedure states: 'Whenever the Government submits a bill to the Parliament requesting approval of any kind of treaty...' And Article 136 of the Rules provides that: 'Based on Article 74 of the Constitution, all the legal bills submitted to the Parliament should be endorsed by the President and minister or the ministers concerned.' Under Principle 74 of the Constitution: 'Bills are submitted to the Assembly after they are approved by the Board of Ministers.'

⁶³ For further information on legal and judicial agreements see the website of the Parliament Research Center.

Regarding the WTO, there have been even more phases which were discussed in 1.2. General Information on Accession to the WTO

As mentioned before, under Principles 77 and 125 of the Constitution, an international agreement shall be submitted to the Parliament in the form of a bill to be legally binding upon the Government of Iran. After the bill is discussed in the Parliament it will be checked for constitutionality and, then, it can finally be signed by the President to be binding. This task of the Parliament is taken from its 'approbation supervision'⁶⁴ power, which is discussed in chapter three (3.5.4. Legislature).⁶⁵

The multilateral agreements are usually examined and adopted through a detailed adoption process in the Parliament, as is addressed in chapter five (Articles 173 to 177) of its Rules of Procedure.

4.3.3.2. Agreement Adoption Phases in the Parliament

There are two methods to discuss international agreements in the Parliament: one reading (1); and two readings (2). These two methods are introduced as follows:

⁶⁴ Hashemi (2012), pp. 180-181.

⁶⁵ The 'approbation supervision' means that the Parliament can make the final decision and it is not necessary to send the issue to other constitutional institutions to be examined and decided. Therefore, the Parliament is the final decision maker.

(A) One-reading method

This method is followed for ordinary international agreements. Most multilateral and bilateral agreements are discussed through the one-reading method. In this method, an international agreement, which is approved by the Government (the Board of Ministers) as a bill, should be submitted to the Parliament. After it is received, the Parliament formally announces its receipt.⁶⁶ Then, it will be immediately printed to be distributed among the Parliament Members and will be referred to the relevant committees. The bill can be referred to one main committee and several sub-committees. Under Article 44 of the Rule, the bill can also be sent to a 'select committee' if '*vital and exceptional issues confronted by the country necessitating the establishment of a select committee to consider and prepare a report on such an issue*'.⁶⁷ There should be at least 15 Members of the select committee which are elected by the Parliament.⁶⁸ The relevant committee(s) should promptly put it on their agenda. The relevant governmental institutions are also invited to discuss the agreement in the committee(s). The discussions include both the whole agreement (generalities) and its articles (details). After the result of the discussions is adopted, the final report of the discussions, including the report of the main and the sub-committees, should be submitted to the Parliament. After the final report is presented to the Parliament by the representative (spokesperson) of the main committee, two opposing and two supporting Members of the Parliament can speak on the generalities and details (each one for 15 minutes) and, if required, the representative of the Government can also defend the bill. Then it will put to a vote.⁶⁹

In addition to the one-reading method, there is also a two-reading method which is used for discussing important international agreements.

(B) Two-reading method

This method is used for discussing important international agreements. After the bill of the international agreement is formally received by the Parliament,

⁶⁶ Article 174 of the Parliament's Rules of Procedure.

⁶⁷ Article 44 of the Parliament's Rules of Procedure.

⁶⁸ For instance, the nuclear deal between Iran and the group of 5+1 countries was referred to a select committee to be discussed.

⁶⁹ Article 176 of the Parliament's Rules of Procedure.

in case the Government deems the bill 'important', or if within one week after the referral the committee or 15 Members of Parliament deem it to be important, it should be immediately put on the agenda of the Parliament. One Parliament Member proposes this classification as important and another Member speaks against the classification as important (each for five minutes).⁷⁰ Then if the classification as important is approved, the bill will be discussed in two readings as follows:

In the first reading, the discussion will be on the whole bill (generalities). The objections to certain terms and articles will be referred to the Committee in the form of written proposals. 24 hours before being presented in the Committee, the proposals must be printed and distributed among the Members of the Parliament.

Under Article 177 of the Rules of Procedure, 'in the second reading, the Committee shall present to Parliament the objectionable points and proposals made by the representatives, as well as its idea on the points, along with the approval and/or rejection of the articles without any changes, and then, on the points which the representatives rejected in writing and presented to the Committee within due time, the opposing Members of the Parliament, the pro and against representatives - each for 5 minutes - will speak and a vote will be held to see whether the objection is right or wrong.'⁷¹

If the Parliament approves the objections and proposals, then the Government should negotiate with other contacting party(ies) on the objected and proposed points and the bill remains on the Parliament's agenda until the new negotiations are finalized. In case the objections and proposals are accepted by other party(ies), the amended text will be considered approved. Otherwise, the bill will be discussed in the Parliament on the basis of the latest proposal of the Government and, after the speeches of two Members, one for and another against (each for five minutes), the bill shall be put on the vote.⁷²

⁷⁰ Article 175 of the Parliament's Rules of Procedure.

⁷¹ Article 177 of the Parliament's Rules of Procedure.

⁷² Ibid.

Most international agreements are discussed in the Parliament through the one-reading method. Sometimes adopting a bill is so urgent that the Government or the 15 Parliament Members request it to be discussed in the form of a 'very urgent method'.⁷³ In this method the Guardian Council Members should participate in the discussions and after the bill is adopted by the Parliament, they will declare their views on its constitutionality.⁷⁴

(C) Constitutionality review of multilateral agreements by the Parliament

An important question which may arise in the agreement adoption process in the Parliament is whether the Parliament can check the constitutionality of a bill such as the WTO accession protocol during its discussions.

The answer to this question, as discussed in chapter three,⁷⁵ is positive. Sometimes the Parliament Members, during the discussions in the Committees and after the final report is presented, make objections or proposals on the basis of constitutionality. Under Article 196 of the Rules of Procedure of the Parliament, the warning on constitutionality (i.e. inconsistency with the Constitution) takes '*priority over other issues and will stop discussions on the main issue.*' This warning should be announced before the voting. If accepted, an amendment or omitting the problematic point(s), or its referral to the Committee for re-consideration will be performed.⁷⁶

The constitutionality review/warning by the Parliament regarding international agreements usually includes several issues such as: Principle 75

⁷³ Under Article 165 of the Parliament's Rules of Procedure: 'The very urgent bills and motions will be investigated in the following ways: 1. Within maximum four hours after approval of the urgency, the bill or motion will be printed and distributed and referred to related committee. 2. Within maximum 20 hours after ratification of the urgency, the proposal of representatives will be submitted to related committee. 3. Within maximum 72 hours after ratification of the urgency of the report of the committee, it will be on the Parliament agenda.' (Translation Iran's Parliament).

⁷⁴ Principle 97 of Iran's Constitution states: 'when an urgent bill or draft is on the agenda of the Assembly, members of the Guardian Council must be present at the Assembly and express their opinion.'

⁷⁵ See chapter three, section 3.5.4. (Legislature).

⁷⁶ Article 196 of the Parliament's Rules of Procedure.

on imposing extra expenses to the Government;⁷⁷ Principle 139 on referral of state and public property disputes to dispute settlement systems,⁷⁸ etc. An issue that has been occasionally announced by the Parliament in discussing international agreements is about the lack of the full text of the agreement. In other words, sometimes the bill of an agreement was submitted by the Government to the Parliament and did not include the full text of the international agreement. Since the adoption of Article 173 of the Rules of Procedure, the full text of the documents must be appended to the bill submitted to the Parliament.⁷⁹

Sometimes the Parliament proposes reservations to the text of an international agreement. This will be discussed later in the relevant topic on reservations. Other constitutional authorities which can be involved in the adoption process of an international agreement are presented below.

4.3.3.3. Other Authorities in the Adoption Process

Another important question is whether other constitutional authorities, such as the Supreme Council for National Security, can discuss and approve international agreements?

Sometimes an international agreement is very important and can seriously affect the national interest and security of the country. Then, the President, as the Head of the Supreme Council for National Security, or the Leader can refer the examination of the agreement to the Supreme Council. As the examination and adoption of the international agreements are referred to the Parliament by the Constitution (which is an exclusive task of the Parliament), if the final views of the Supreme Council and the Parliament on the adoption of the agreement differ, how can this conflict be resolved?

Under Principle 57 of the Constitution, the governing powers in Iran consist of the Legislature, the Executive, and the Judiciary, which operate under the

⁷⁷ Principle 75 states: 'The legal proposals, suggestions, and amendments to the existing bills which lead to a reduction in public income or increase in public expenditure can only be introduced in the Assembly if they also specify how the reduction in income or increase in new expenditure is to be compensated.'

⁷⁸ This issue is discussed in detail in this research.

⁷⁹ Article 173 of the Parliament's Rules of Procedure.

supervision of the absolute power of the Leader (*Velayate Amr*). This is discussed in detail in chapter three.⁸⁰ Under the Theory of *Velayate Faqih*, the Leader has full control over the tasks of the constitutional institutions such as the Parliament. Also as discussed in chapter 3⁸¹, the Leader can refer some of his duties and authorities to another person.⁸² Therefore, if the Leader refers the examination of an important agreement to the Supreme Council for national security, the final view of the Council should be followed by the Parliament. Even if the President refers the issue to the Council, due to the fact that the decisions of the Council shall be adopted by the Leader to be enforced,⁸³ if the Leader adopts the Council's view on a controversial international agreement, the Council's view should be considered as binding. To conclude, the Leader's view (which is reflected in the Council's decision) prevails over the Parliament's view.

Sometimes the Parliament does not take some international agreements under exact consideration. This issue is discussed below.

(E) Parliament's Practice on the Fast reading discussion in the Parliament for Model Agreements

The usual norms regarding the phases of the adoption of an agreement in the Parliament were introduced in the previous sections. However, according to the Parliament's practice, there is a very fast reading phase which is not, I think, consistent with the relevant rules on an adoption process. This phase is presented below.

An issue in relation to the adoption of international agreements which can be raised on the Parliament's procedure concerns the fast adoption of some agreements. Sometimes a number of agreements are ratified all together in

⁸⁰ See chapter three, section 3.4.1. (Cornerstones/Elements of Iran's Constitutional System) and section 3.4.1.3. (The Theory of *Velayate Faqih*).

⁸¹ See chapter three, section 3.5.1 (The Leader (Under Iran's Constitution)).

⁸² Principle 110 of Iran's Constitution.

⁸³ Principle 176 of Iran's Constitution.

one session of the Parliament. These can result in a situation in which the Parliament does not consider some agreements closely.⁸⁴

As stated in Article 12 of the 'Regulation on How to Draft and Conclude International Agreements' (1992), bilateral agreements can be negotiated on the basis of model agreements. A model agreement under Article 12 is a text based on which at least three agreements have been adopted. The model agreements are drafted by the 'International Agreements Study Commission'⁸⁵ at the Legal Vice-President Office. Most international bilateral agreements are negotiated and signed on the basis of model agreements. In drafting a model agreement, the mentioned Commission usually takes all the controversial points and concerns under consideration. Therefore, the Parliament is familiar with the standard format of most bilateral agreements and, when a new agreement is discussed in the Parliament, merely the new points which are negotiated beyond the model agreement are scrutinized. That is why sometimes several similar agreements are adopted by the Parliament in one session. There have been agreements adopted whose controversial provisions, such as inconsistency with Principle 139 of the Constitution on dispute settlement, have been disregarded by the Parliament and the Guardian Council. This will be discussed later.

For a better understanding of how the agreement adoption process works in the Parliament, the adoption process of some international agreements is presented below.

4.3.3.4. Instances of Adopted Agreements in the Parliament

The adoption process of two international agreements in the Parliament - which were introduced in the previous section - are presented below: One multilateral agreement (1), and one bilateral agreement (2).

⁸⁴ For instance, the Parliament approved nine agreements on 27 June and seven agreements on 31 July and eleven on 21 August 2007.

⁸⁵ The 'International Agreements Study Commission' is composed of representatives of Foreign Affairs Ministry, Centre for International Legal Affairs (CILA), the relevant organization and three law academics.

(A) Multilateral agreement:

'*Preferential Trade Agreement among D-8 Member States Act*' which was received from the Government on 29 October 2006, adopted by the Parliament on 27 August 2007, confirmed by the Guardian Council on 3 September 2007 and finally signed by the President on 17 September 2007. This agreement was referred to the Economic Committee of the Parliament as the main committee and to the Sub-Committees: Legal and Judicial; and National Security and Foreign Policy.

This agreement was adopted in the Parliament by adding one note to the bill which provided:

Note. Implementation of Article 26 of the Agreement concerning the referral to arbitration by the Government of Islamic Republic of Iran is subject to observing Principle 139 of the Constitution.⁸⁶

The above-mentioned sentence, which was added to the multilateral agreement is a reservation to the article which includes the dispute settlement provisions. Therefore, the Parliament took the constitutionality of the agreement into consideration. By adding the above-mentioned sentence to the bill in the Parliament, the agreement was confirmed in a short period of time by the Guardian Council. If the Parliament had not noticed the constitutionality issue, it could have been announced by the Guardian Council and then it would have been sent again to the Parliament to implement the view of the Guardian Council which could take much longer.

(B) Bilateral agreement:

'The Act of Agreement between the Islamic Republic of Iran and the Government of Republic of Indonesia on the Encouragement and Mutual Protection of Investment' was received by the Parliament on 31 July 2005, adopted by the Parliament on 25 July 2007, confirmed by the Guardian Council on 8 August 2007 and signed by the President on 25 August 2007.

⁸⁶ (Translation S.A), for further information see the website of Islamic Parliament Research Centre at: <http://rc.majlis.ir>, last visited on 1-10-2016.

This agreement was referred to the Economic Committee as the main Committee of the Parliament and to the Sub-Committees of Legal and Judicial; and National Security and Foreign Policy.

To observe the constitutionality requirement, the Parliament added one sentence to the agreement:⁸⁷

Note. Referral of the disputes under Articles 11 and 12 of this Agreement to arbitration by the Government of Islamic republic of Iran is subject to observing the relevant laws and regulations.⁸⁸

Similar to the above-mentioned multilateral agreement, by adding the above-mentioned sentence, the Parliament formulated a reservation to this bilateral agreement to make it consistent with the constitutional requirements on dispute settlement. How Iran's WTO accession protocol can be examined and adopted by the Parliament is briefly discussed below.

4.3.3.5. *WTO Accession Focus in the Parliament*

It is believed that, after Iran's WTO accession protocol is adopted by the WTO General Council, it should be adopted by the Board of Ministers in Iran and then it should be submitted to the Parliament to be discussed and adopted. As the protocol is 'important', it can be discussed and adopted through the two-reading method by the Parliament. Even though the negotiations to join multilateral agreements are usually undertaken by the Government, other governmental and non-governmental entities should not be put aside. For instance, participation of the relevant experts from the Parliament and Judiciary in the accession process can play an important role in the acceleration of Iran's accession process to the WTO.⁸⁹

⁸⁷ It bears considering that under the international rules on treaties, no reservation can be formulated with regard to bilateral agreements. However, under Iran's international agreements adoption process, if a sentence is added by the Parliament to a bilateral agreement, it should be renegotiated by the Government with the other party.

⁸⁸ (Translation S.A), for further information see the website of Islamic Parliament Research Centre at: <http://rc.majlis.ir>, last visited on 1-10-2016.

⁸⁹ If some Members of the Parliament who have relevant expertise with the WTO agreements participate in the WTO accession process, including the bilateral and multilateral negotiations and discussions, Iran's protocol of accession can be better

To remove the inconsistency with the Constitution, reservations similar to the above-mentioned instances on multilateral and bilateral agreements can be formulated by the Parliament and added to the accession protocol. Otherwise, the Guardian Council will send it back to the Parliament to do so. The process of implementing a constitutionality review by the Guardian Council is discussed in the following section.

4.3.4. Who Checks the Constitutionality in Accession Process?

The constitutionality review is one of the important phases of the adoption process for multilateral agreements in Iran, which can also result in legal impediment to Iran's accession to the WTO. How international agreements, such as the WTO accession protocol, are checked for constitutionality - to recognize whether they are inconsistent with Iran's constitutional rules and Islamic principles - is discussed below.

In the adoption of multilateral agreements, a constitutionality review is performed through a detailed process by some of Iran's constitutional institutions. To introduce this important process, first an introduction (A) is presented. Then, the constitutionality review process by the Guardia Council is addressed (B), the process of removing unconstitutionality by the Parliament (C) is discussed, and an international agreement including unconstitutionality (D) is presented. Finally, the constitutionality review in the adoption of the WTO accession protocol will be examined (E).

4.3.4.1. Introduction

How international agreements, such as Iran's protocol of accession to the WTO, can be adopted by the Parliament was discussed in the previous section. Under Principle 94 of Iran's Constitution, all approvals of the Parliament must be sent to the Guardian Council for constitutionality review. As discussed earlier, before a bill is adopted, the Parliament can check the constitutionality. However, after a bill is adopted, no objection can be accepted from the Parliament Members on constitutionality and this task will

introduced to the Parliament and then its adoption process in the Parliament can be facilitated and shortened.

be referred to the Guardian Council. The Guardian Council was discussed in detail in chapter three.⁹⁰

4.3.4.2. Constitutionality Review Process by the Guardian Council

Under Iran's Constitution, the constitutionality process in the Guardian Council includes two methods: Consistency with Islamic principles (1) and Consistency with the constitutional principles (2). Each one is introduced below.

(A) Consistency with Islamic principles

After an international agreement is adopted in the Parliament, it will be submitted to the Guardian Council. An examination as to whether an international agreement is inconsistent with Islamic principles is undertaken by the Islamic law expert members of the Council. The decision on constitutionality by the six '*Faqihs*' who are appointed by the Leader is taken by majority.⁹¹ In addition to the constitutionality of Islamic principles, the Parliament's approvals shall be checked for consistency with the constitutional principles.

(B) Consistency with the Constitutional principles

The determination of whether an adopted agreement by the Parliament is inconsistent with the principles of the Constitution is performed by 12 members of the Council including the six *Faqihs* (Islamic law experts) and six law experts (who are appointed by the Parliament). Therefore, under Principle 96 of the Constitution: '*a majority of all the members of the Guardian Council shall determine the compatibility of the proceedings with the constitution.*'⁹²

The Guardian Council should declare its decision to the Parliament within 10 days. If necessary, this period can be extended once and the Guardian Council must state its reasons for the extension.⁹³ As mentioned before, the urgent

⁹⁰ See chapter three, section 3.5.4.2. (Guardian Council).

⁹¹ Principle 96 of Iran's Constitution.

⁹² Ibid.

⁹³ Principle 95 of Iran's Constitution.

international agreements can be discussed in the Parliament through the 'very urgent method' and the members of the Guardian Council shall also be present in the Parliament. After the agreement is adopted, the Council must declare its decision on constitutionality (within 24 hours).⁹⁴

(C) Removing unconstitutionality process

If an international agreement includes inconsistency with the Constitution, it shall be sent back to the Parliament to remove the inconsistency. The removal of inconsistency is introduced in three phases below: sending the agreement back to the Parliament (1), reconsideration of the agreement by the Parliament (2), insisting on the unconstitutional agreement by the Parliament (3).

(1) Sending the agreement back to the Parliament: Under Principle 94 of the Constitution, The Council returns the international agreement to the Parliament for reconsideration if it is inconsistent. Otherwise, or if the 10 days (and if extended 20 days) have expired, the agreement can be sent to the President for final signature.⁹⁵ After the Council sends an international agreement back to the Parliament, it cannot declare 'new' inconsistencies with the 'Constitution' again to the Parliament. However, if it finds 'new' inconsistencies with the 'Islamic principles', they can be announced to the Parliament.⁹⁶

(2) Reconsideration of the agreement by the Parliament: When an international agreement is sent back to the Parliament, the Council must also declare the reasons why it is inconsistent.⁹⁷ This is because the controversial provisions are referred to the relevant Committee to be discussed and to remove inconsistencies. The representative of the Council shall also be invited to the Committee to clarify the Guardian Council's views on the

⁹⁴ Article 17 of the Internal Regulation of the Guardian Council and also Principle 97 of Iran's Constitution.

⁹⁵ Article 99 of Parliament's Rules of Procedure.

⁹⁶ Article 201 (Note 1) of the Parliament's Rules of Procedure.

⁹⁷ Article 200 of the Parliament's Rules of Procedure.

inconsistencies;⁹⁸ however, the Committee can continue the discussions if the representative of the Guardian Council does not participate.⁹⁹

When an international agreement is sent back to the Parliament, an overview of the inconsistencies is immediately distributed among the Parliament members.¹⁰⁰ This is to enable the Members of the Parliament to submit proposals to the Committee and take part in the discussions regarding the removal of the inconsistencies.¹⁰¹ The Committee submits its report, including its proposals and the proposals received from Parliament Members. First, the Committee's report and proposals and then other proposals are presented, discussed and voted upon in the Parliament. If neither the Committee's proposals nor other former proposals are approved, new proposals can be also discussed.

(3) Insisting on the unconstitutional agreement by the Parliament: The final view of the Parliament shall be submitted to the Guardian Council. If, in the Council's view, the inconsistency remains, the international agreement must be sent back again to the Parliament.¹⁰² If the Parliament, considering the national expediency, still holds its views on the adopted international agreement, the Head of the Parliament can send it to the National Expediency Council.¹⁰³ How this Council deals with international agreements is discussed in the following section. It is stated in the Parliament's Rules of Procedure that a bill should be sent twice to the Guardian Council before referral to the National Expediency Council. However, sometimes once a bill is sent back to the Parliament because of unconstitutionality, the Parliament refers it to the National Expediency Council. However, this practice is consistent with Article 25 of Internal Regulation of the NEC. Under Article 25 of the Internal Regulation, to refer an issue to the NEC, it is not required that the Parliament's approval to be sent to the Guardian Council twice.

⁹⁸ Article 201 of the Parliament's Rules of Procedure.

⁹⁹ *Ibid.*

¹⁰⁰ Article 200 of the Parliament's Rules of Procedure.

¹⁰¹ Article 201 of the Parliament's Rules of Procedure.

¹⁰² Article 202 of the Parliament's Rules of Procedure.

¹⁰³ *Ibid.*

4.3.4.3. *Examination of an Agreement which was Inconsistent with the Constitution*

To recognize how the process of removing inconsistency works regarding international agreements, an example is presented below. The adoption process of a multilateral agreement in: the Government (1), the Parliament (2), the Guardian Council, and finally the National Expediency Council (4) are briefly discussed as follows.

(1) Adoption by the Government: Signature and adoption process by the Government: On 7 July 2005 a multilateral agreement on the promotion and protection of investment was negotiated by the Members of the Economic Cooperation Organization (ECO). Two years later, on 7 April 2007 its protocol was also signed and annexed to the agreement. This multilateral agreement and its protocol were adopted by Iran's Board of Ministers on 27 July 2008 and the Economic Ministry was the relevant organization. The bill of '*Agreement on Promotion and Protection of Investment among Member States of the Economic Cooperation Organization and its amended Protocol*' was sent to the Parliament on 3 September.

The constitutionality review was performed by the Government and two sentences were added (to remove the inconsistency with the Constitution) to the beginning of the bill to which the agreement was annexed.¹⁰⁴ The first sentence was a reservation to the dispute settlement system of the agreement which stated:

Note 1. Referral of disputes subject to Articles (9) and (10) of the Agreement to Arbitration by Islamic Republic of Iran are subject to observing the relevant laws and regulations.¹⁰⁵

As it is stated in the above-mentioned reservation, the disputes were not limited to state and public properties. Observing the relevant laws and regulations means being in line with the requirements of Principle 139 of the Constitution.

¹⁰⁴ The bills of the agreements are usually adopted by the Government and the Parliament as an annex to an individual Article. Sometimes some sentences are added to the mentioned article as Notes to formulate reservations.

¹⁰⁵ (Translation S.A).

The second sentence stated:

Note 2. Amendments under Article (13) of the Agreement as to the Islamic Republic of Iran will be enforced after following the law making process.¹⁰⁶

This reservation makes the acceptance of the new amendments by Iran conditional on the adoption by Iran's Parliament. It is worth considering that under Article 13 of the agreement, any amendment shall be made through consensus. Article 13 states:

Any process for amendment could be initiated at the request of any of the Contracting Parties. However, the Agreement may only be amended through consensus of the Contracting Parties.¹⁰⁷

It bears mentioning that, even though under Article 17 (1) of the agreement no reservation is accepted, the above-mentioned reservations were formulated by Iran's Government. Article 17 states:

This Agreement may not be signed with reservation nor shall reservations be admitted at the time of ratification.¹⁰⁸

The agreement, including the mentioned reservations, was submitted to the Parliament to be adopted.

(2) Adoption by the Parliament: The agreement was referred and then discussed and approved by the Economic Committee (29 September) and two Sub-Committees: National Security and Foreign Policy Committee (6 October) and Legal and Judicial Committee (its report was not received by the main committee). The reports of the Committees did not change the Government's adoption and the agreement was adopted by the Parliament with the mentioned reservations on 3 December 2008.

(3) Constitutionality review by the Guardian Council: the Parliament's approval was submitted to the Guardian Council on 10 September. The

¹⁰⁶ (Translation S.A).

¹⁰⁷ (Translation S.A).

¹⁰⁸ (Translation S.A).

Guardian Council discussed the agreement and the reservations on 10 September and issued its decision three days later. In the Council's view, the agreement was inconsistent with the Constitution because it included a referral to arbitration. The Council believed that the suggested reservation by the Government could not remove the inconsistency. The Council stated:

Considering the provisions of Article 17 of the Agreement which bans reservation, the reservation stated in Note (1) of the adopted Article (by the Parliament) cannot be accepted by the Agreement and therefore, the rules of the Agreement regarding referral to arbitration are recognized as inconsistent with Principle 139 of the Constitution.¹⁰⁹

Therefore, the agreement was sent back to the Parliament to be amended to remove the inconsistency with the Constitution. The Parliament referred the agreement again to the relevant Committees. The Committees discussed it again but did not change the reservations which were added. The Parliament also did not change its view and again adopted the previous reservations on 4 February 2009. As the Guardian Council insisted on its view regarding the unconstitutionality and the Parliament did not remove the inconsistency, the agreement was submitted by the Head of the Parliament to the National Expediency Council on 12 February.

(4) The National Expediency Council's Adoption: The National Expediency Council (NEC) discussed the agreement in its relevant Committees and finally adopted it on 12 September 2009. The NEC removed the first reservation with regard to observing the Principle 139 requirement on the referral of disputes to arbitration and adopted the agreement with the second reservation. It was stated in the letter of the Head of the NEC to the Parliament that:

¹⁰⁹ The Guardian Council's letter to the Parliament on adopted 'Agreement on Promotion and Protection of Investment among Member States of the Economic Cooperation Organization and its amended Protocol' by the Parliament. no. 87/30/29735 dated 27 December 2008, (Translation S.A).

The Parliament's view, after removing Note (1) of the adopted Article, was approved by the Council.¹¹⁰

The agreement was formally announced to the President on 29 December 2009 to be signed.

To conclude, in discussing a dispute between the Guardian Council and the Parliament under Principle 112 of the Constitution, the National Expediency Council does not check the constitutionality. However, the decisions of the Council cannot be inconsistent with Islamic principles. Therefore, the requirements of Principle 139 of the Constitution were not taken into consideration for the adoption of the agreement by the National Expediency Council. This inconsistency with the Constitution can be ignored by the NEC in case a parliamentary approval or agreement is needed for the country. The NEC can accept the inconsistency with the Constitution, because this power is given to the NEC to avoid frequent amendments to the Constitution where a law or agreement is needed for the country.

This adoption process, which was experienced for the above-mentioned agreement, can be similar to what is expected for the adoption of Iran's accession to the WTO.

4.3.4.4. The Constitutionality Review in the Adoption of the WTO Accession Protocol

Iran's Constitution has delegated the Guardian Council the task of carrying out a constitutionality review to avoid any inconsistency between Iran's Constitution and multilateral agreements such as the WTO agreements. Also, Principles 4, 94 and 96 of Iran's Constitution have required the 'compatibility' of Parliament's approvals with the Constitution (and Islamic rules). For instance, Principle 4 states: '*All ... laws and regulations must be based on Islamic criteria.*' That is to say that there is difference between a 'compatibility' review and an 'inconsistency' review. However, in practice, the

¹¹⁰ Letter of the National Expediency Council to the Parliament, no 61669/0101 dated 15 December 2009 regarding the 'Agreement on Promotion and Protection of Investment among Member States of the Economic Cooperation Organization and its amended Protocol', (Translation S.A).

implementation of this task (constitutionality review) regarding adopted international agreements has been restricted to merely checking for inconsistency/conflict. This is due to the difficulties of checking the compatibility/consistency of parliamentary approvals with the Constitution and Islamic principles. For instance, an examination, as well as determination, on the compatibility of the WTO agreements with Islamic theories on economy, trade, law, etc. cannot be achieved in a short period of time. This is also relevant with regard to checking the compatibility of the specific model of the trade and economic system in Iran with the models of the WTO system in Iran's accession. It is due to this difficulty, I think, that the Guardian Council's review is limited to merely checking for inconsistency. In other words, the Council only determines whether there is any conflict between the Constitution (and Islamic Principles) and the bills adopted by the Parliament.

One of the controversial issues which has been mostly taken into account by the Guardian Council in Iran's accession to international agreements and organizations is checking the constitutionality regarding Principle 139. This Principle of the Constitution, which is discussed in the subsequent chapter, includes requirements on the referral of state and public property disputes with non-Iranians to dispute settlement systems. Therefore, it is believed that, due to this Council's practice, the conflict between Principle 139 and the WTO Dispute Settlement Understanding (DSU) can make Iran's accession to the WTO very difficult. The reaction of the Parliament to this view of the Guardian Council has been usually adding a sentence to the adopted agreement, which requires compliance with the requirements stated in Principle 139. However, whether this can remove the inconsistency between the DSU and Iran's Constitution needs to be deeply scrutinized. Otherwise, it can result in a legal impediment regarding Iran's accession to the WTO.

Another inconsistency can be between the TRIPS agreement including the protection of intellectual property rights and Islamic principles. This has been the most important reason that Iran has not joined the Berne Convention for the protection of literary and artistic works.¹¹¹ A further discussion on this

¹¹¹ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at

inconsistency and other possible inconsistencies between the WTO and Iran's Constitution is beyond the limited scope of this research. However, how these kinds of inconsistencies can be dealt with in Iran's adoption process for multilateral agreements is shortly discussed in the following sections.

4.3.5. The Role of the National Expediency Council in the Accession Process

Sometimes there is an inconsistency between a Parliamentary approval and the Constitution. This issue causes a conflict between the Parliament and the Guardian Council regarding the unconstitutionality of a disputed international agreement, such as the WTO accession protocol, and can be resolved by the National Expediency Council (NEC). The agreement adoption process in the NEC is presented in the following subsections: introduction (A), international agreements in Principle 112 adoption process (B), international agreements in Principle 110(8) adoption process (C), National Expediency Council's and constitutionality review (D), international agreements adopted in the NEC (E), WTO accession focus (F). Each one is shortly discussed as follows.

4.3.5.1. Introduction

After accession to a multilateral agreement/organization such as the WTO is adopted by the Parliament, it will be submitted to the Guardian Council to be checked for constitutionality. If the Guardian Council finds an inconsistency with the Constitution, the agreement shall be sent back to the Parliament to be reviewed. The Parliament reviews the agreement to remove the inconsistency. However, if, when considering national expediency, the Parliament does not remove the inconsistency, the agreement can be submitted to the National Expediency Council to be discussed and adopted.

Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with a Protocol regarding developing countries). For further information see: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280115ec9>, last visited on 1-10-2016.

4.3.5.2. International Agreements in Principle 112 Adoption Process

The Council is given several tasks by the Constitution which are discussed in detail in chapter three.¹¹² The task on resolving the dispute between the Parliament and the Guardian Council is taken from Principle 112 of Iran's Constitution. The Council's task is not limited to mere arbitration between the Parliament and the Guardian Council. Under Principle 112, the Council can adopt a third view (different from the views of the Parliament and the Guardian Council) on the basis of the national expediency of the country. Also, under Article 28 of the Internal Regulation of the Council, to resolve a dispute, the Council can amend the disputed provisions of the Parliament's approval. Also, if the amendments require necessary amendments to the other relevant articles, it is allowed. However, to make an amendment beyond the disputed and relevant articles, it must be authorized by the Leader.¹¹³

Under Article 202 of the Parliament's Rules of Procedure, the Head of the Parliament can request the National Expediency Council to resolve the above-mentioned disputes on the basis of Principle 112 of the Constitution. In addition to the Head of the Parliament, under Article 25 of Internal Regulation of the NEC, the President (head of the Executive) and the Head of the NEC can also refer a dispute (between the Parliament and the Guardian Council) to the National Expediency Council.

The disputes are usually referred to the relevant Committees of the NEC to be discussed. After the report of the Committees is presented to the NEC, one of the Guardian Council's Members, the Chairman of the relevant Committee of the Parliament and the minister or the head of the organization relevant to the disputed international agreement can clarify their views. After hearing the views of two proponents and two opponents from the NEC Members, the agreement will be voted on.¹¹⁴

The NEC should issue its view on the issue (the disputed international agreement) within three (working) months.¹¹⁵ However, if extra time is

¹¹² See chapter three, section 3.5.5. (National Expediency Council).

¹¹³ Article 29 of Internal Regulation of the National Expediency Council.

¹¹⁴ Article 27 of the Internal Regulation of the National Expediency Council.

¹¹⁵ Article 25 bis of the Internal Regulation of the National Expediency Council.

needed, it can be requested by the relevant Committee to be extended up to one year by the Head of the NEC. If the dispute is not resolved within one year, the Guardian Council's view will be enforced.¹¹⁶

In addition to the adoption process under Principle 112, there is also another constitutional method which is shortly introduced below.

4.3.5.3. International Agreements in the Principle 110(8) Adoption Process

Under Principle 110(8), if an issue cannot be resolved through the ordinary means (such as Parliament's decisions), it can be requested from the Leader to be referred to the National Expediency Council to be resolved there. Therefore, Iran's Constitution has provided a possibility for the adoption of issues which cannot be adopted through the Parliament. However, whether this method can be used for international agreements requires further discussions. This method is discussed in chapter three¹¹⁷ and is also very briefly presented below in this chapter.¹¹⁸ So far, no international agreement has been adopted under Principle 110(8).

4.3.5.4. National Expediency Council and Constitutionality

Under Principle 112 of Iran's Constitution, the National Expediency Council can resolve the disputes between the Parliament and the Guardian Council on unconstitutionality. The question is whether the National Expediency Council's approvals can be inconsistent with Islamic rules.

This question has been referred to the Guardian Council twice by the Head of the National Expediency Council. Accordingly, the Guardian Council has issued two interpretations to answer this question clearly. The first Guardian Council's response is based on Principle 4 of the Constitution which states that all 'laws and regulations must be based on Islamic criteria.'¹¹⁹ The Guardian Council states:

¹¹⁶ Ibid.

¹¹⁷ See chapter three, section 3.6.4. (National Expediency Council's Role).

¹¹⁸ See section 4.3.6. (The Leader's Role in the Accession Process).

¹¹⁹ Principle 4 of Iran's Constitutions states that: 'All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This Principle governs all the articles of the constitution, and

On the basis of Principle 4 of the Constitution, the National Expediency Council's approvals cannot be inconsistent with Islamic criteria.¹²⁰

On the basis of the mentioned interpretation issued by the Guardian Council, the National Expediency Council's decisions shall be consistent with Islamic principles.

However, one month later, the second question was asked by the Head of the National Expediency Council on the basis of the first interpretation for more clarification:

Please declare the Guardian Council's view on the term "inconsistent with Islamic criteria" which is used in section 3 of the above mentioned interpretation. This is due to this fact that pursuant to Principle 112 of the Constitution, the (National Expediency) Council's position is determination on these issues.¹²¹

In answering this question, The Guardian Council issued the second interpretation on Principle 112 of the Constitution.

By the term 'inconsistent with Islamic criteria' it is meant that (the National Expediency Council's approvals) shall be inconsistent neither with the primary rules of Islam, nor the secondary Islamic rules. And in this respect, the beginning of Principle 112 has merely authorized determination on (the basis of) secondary titles (rules).¹²²

For a better clarification of the second interpretation issued by the Guardian Council, it bears considering that, under Islamic rules, when in exceptional

other laws and regulations. The determination of such compatibility is left to the *Foqaha* of the Guardian Council.'

¹²⁰ The Guardian Council's Interpretation number 4575 dated 24 May 1993 which was issued on Principle 112 of Iran's Constitution, (Translation S.A). For detailed information see the Guardian Council's website.

¹²¹ The question asked by the Head of the National Expediency Council on Principle 112 of the Constitution, no. 3786-2409 dated 24 June 1993, (Translation S.A) see the Guardian Council's website.

¹²² The Guardian Council's Interpretation number 4872 dated 11 July 1993 which was issued on Principle 112 of Iran's Constitution, (Translation S.A) for detailed information see the Guardian Council's website.

circumstances the primary and normal rules cannot be implemented, they can be replaced with the secondary rules. Therefore, according to the second interpretation on Principle 112, decisions of the National Expediency Council must be consistent with Islamic rules and, if due to some special reasons such as the national interest, the first rules cannot be followed, the secondary rules can be temporarily followed. In other words, the National Expediency Council's decisions are restricted to either the primary or the secondary Islamic rules.

There are six *Faqihs* (*Mojtahids*) who decide in the Guardian Council as to whether the Parliament's approvals are inconsistent with Islamic rules or not. These six *Faqihs* are also among the Members of the National Expediency Council. Therefore, when the National Expediency Council decides under Principle 112 on the Parliament's approvals, the final decision also includes the views of the *Faqihs*. In other words, when the six *Faqihs* sit in the Guardian Council, they decide on the basis of the primary rules of Islam, and when in the National Expediency Council, they decide on the basis of the secondary rules. Therefore, both decisions are consistent with Islamic criteria, even though in the National Expediency Council the six *Faqihs* accept the same issue which was rejected by them before in the Guardian Council.

It should be taken into consideration that in practice the National Expediency Council's decisions under Principle 110(8) have sometimes been inconsistent with Islamic rules. For instance, as discussed in chapter three,¹²³ one of the most important approvals of the Council is the law on *Combating the Illicit Drugs* (25 October 1988). Under this law, the death penalty was adopted as the punishment for drug trafficking. However, under Islamic rules, the death penalty is restricted to a limited list of crimes and, therefore, approving the death penalty for a new crime was inconsistent with Principle 4 of Iran's Constitution on Islamic rules.

After the constitutionality review by the National Expediency Council has been discussed, some instances of international agreements which have been adopted by the NEC are now addressed.

¹²³ See chapter three, section 3.6.4. (National Expediency Council's Role).

4.3.5.5. International Agreements Adopted by the NEC

There are a number of bilateral and multilateral agreements approved under Principle 112 of the Constitution by the National Expediency Council. Some of those multilateral (1) and bilateral (2) agreements are:¹²⁴

(A) Multilateral agreements

There are a number of multilateral agreements that, because of unconstitutionality, were disputed between the Parliament and the Guardian Council and finally were adopted by the NEC. Some are mentioned below.

- 'United Nations Convention against Corruption (2003)';
- 'Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999)';
- 'The Protocol Amending Convention concerning International Carriage by Rail (COTIF)(1999)';
- 'Asian-African Legal and Consultative Committee (AALCC) on Establishment of Tehran Arbitration Centre (1997)'
- 'WHO Framework Convention on Tobacco Control (2003)'.

(B) Bilateral agreements

A number of bilateral agreements on several subjects, such as sea navigation, trade, legal and judicial cooperation, extradition and transport of criminals, etc. are also approved between the Islamic Republic of Iran and other countries, such as Afghanistan, Algeria, Armenia, Azerbaijan, Bangladesh, Belarus, China, India, Kazakhstan, Kirgizstan, Kuwait, Qatar, Russian Federation, Slovenia, South Africa, Syria, Tunisia, Ukraine and Uzbekistan.¹²⁵

We can learn from the way the NEC has dealt with bilateral and multilateral agreements. Those international agreements including inconsistency with Iran's Constitution can result in a conflict between the Parliament and the Guardian Council, however this is not a big issue. Since, if the disputed agreement is required for the national interest of the country, the conflict can be easily removed by the National Expediency Council, similar to many

¹²⁴ For the further information see the website of the National Expediency Council at: www.maslahat.ir, last visited on 1-10-2016.

¹²⁵ For the further information see the website of the National Expediency Council.

agreements that have so far been adopted there. This is what can be expected regarding the WTO accession protocol.

4.3.5.6. WTO Accession Focus

After Iran's protocol of accession is adopted by the WTO General Council, it needs to be adopted by Iran's Government and then the Parliament. If the adopted protocol is sent back by the Guardian Council to the Parliament because of unconstitutionality, it would be referred to the National Expediency Council to be adopted there.

Another method to adopt the protocol of accession would be the method under Principle 110(8) of the Constitution. Even though this method makes the adoption process very short, so far it has not been used for the adoption of any international agreements.

After the adoption process for international agreements in the National Expediency Council has been discussed, the role of Iran's Leader in the mentioned process is introduced below.

4.3.6. The Leader's Role in the Accession Process

Regarding very important and controversial international agreements, the leader can be involved in the adoption process. This is shortly discussed in: introduction (A); negotiation, signature and adoption on exceptional issues (B); Principle 110(8) and international agreements adoption process (C); and WTO accession focus (D). Each one is presented as follows.

4.3.6.1. Introduction

The role of the Leader in Iran's constitutional system was discussed in detail in chapter three.¹²⁶ On the basis of the theory of *Velayate Faqih*,¹²⁷ which is also

¹²⁶ See chapter three, section 3.5.1 The Leader (Under Iran's Constitution).

¹²⁷ *Velayate Faqih* means the governance of a *Faqih* (Islamic expert). Under this theory, the Leader (*Valiye Faqih*) possesses an absolute power which includes all powers of Executive, Legislature and Judiciary. For further information see chapter three, section 3.4.1.3. (The Theory of *Velayate Faqih*).

stated in Iran's Constitution, the Legislature, the Executive, and the Judiciary in Iran operate under the supervision of the Leader.¹²⁸

The absolute power of the Leader enables him to resolve the issues such as accession to multilateral organizations when they can be blocked due to inconsistency with constitutional rules. Under Principle 110(1)¹²⁹ of Iran's Constitution, the task of making national policies is granted to the Leader. He can either limit Iran's accession to international agreements by imposing some requirements or accelerate their adoption process. Some aspects of the Leader's role in treaty adoption process are briefly presented below.

4.3.6.2. *Negotiation, Signature and Adoption on Exceptional Issues*

Under Iran's Principle 113 of Constitution,¹³⁰ the Leader is the highest Executive authority. Therefore, under Article 2(C) of Vienna Convention (VCLT 1969),¹³¹ he has full powers to negotiate and sign the international agreements and also to issue full powers for other authorities.

As discussed in this chapter,¹³² the Leader can authorize the negotiation and signature of controversial bilateral and multilateral agreements and the referral of international disputes to dispute settlement systems.¹³³ And, where

¹²⁸ Principle 57 of Iran's Constitution states: 'The governing powers in the Islamic Republic of Iran consist of the Legislature, the Executive, and the Judiciary. They operate under the supervision of the absolute authority of the command (*Velayat-i Amr*) and religious leadership (*Imamat*) of the community of believers and according to the forthcoming articles of this law. These powers are independent of one another.'

¹²⁹ Principle 110(1) of Iran's Constitution states: 'Determining the overall politics of the Islamic Republic system of Iran after consultation with the National Expediency Council'.

¹³⁰ Principle 113 of Iran's Constitution states: 'After the leadership, the President of the Republic is the highest official of the country. He is responsible for executing the constitution and heading the Executive, except in instances that are directly related to the leadership.'

¹³¹ Article 2(C) of VCLT states: 'In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty.'

¹³² See section 4.3.2. (Negotiation and Signature by the Government).

¹³³ For instance, authorization for negotiation of nuclear deal between Iran and the group of five plus one and also referral of the disputes between Iran and Israel were authorized by the Leader.

it is required, the adoption process of international agreements can temporarily be referred to constitutional authorities¹³⁴ other than the Parliament.¹³⁵

Regarding the adoption of international agreements, there can be another legal capacity/opportunity in the Constitution which is presented below.

4.3.6.3. Principle 110(8) and International Agreements Adoption Process

Under Section (8) of Principle 110 of Iran's Constitution, the problems which cannot be resolved through ordinary methods can be resolved by the National Expediency Council.¹³⁶ For instance, if the approval of a bill cannot be achieved in the Parliament because of its inconsistency with constitutional or Islamic rules, it can be requested from the Leader to be referred to the National Expediency Council to be approved there.

There are no clear rules with regard to how an issue can be submitted to the National Expediency Council to be examined under Principle 110(8). Some issues first went through the Parliament, the Guardian Council and then were submitted to the NEC. There are also other issues which were directly submitted by the Leader to the NEC. Therefore, it can be concluded that there is no rule to require that issues go through the Parliament to the NEC to be examined and decided.

As discussed in chapter three, there are some legislations such as *Combatting the Illicit Drugs Law* (1988) which, due to being inconsistent with the Constitution or/and Islamic rules, were adopted by the National Expediency Council.¹³⁷ Whether this adoption method can be practiced for controversial multilateral agreements, such as the WTO protocol of accession, is shortly discussed below.

¹³⁴ Such as the Supreme Council for National Security.

¹³⁵ The last sentence of Principle 110 of Iran's Constitution states: 'The leader can transfer some of his duties and authorities to another person.'

¹³⁶ Principle 110(8) of Iran's Constitution.

¹³⁷ See chapter 3, section 3.5.5. (National Expediency Council).

4.3.6.4. WTO Accession Focus

In the 1990s there were a number of studies performed by Iran's Government (Ministry of Commerce) to determine whether Iran should join the WTO. Then, the Leader was requested to authorize Iran's application for accession. The authorization was issued on 28 February 1996 by the Leader.

As the Leader, since the very beginning, has been involved in Iran's accession process to the WTO, further support from the Leader can be expected if the adoption of Iran's protocol of accession gets blocked because of unconstitutionality. Even though the National Expediency Council (NEC) can resolve the disputes between the Parliament and the Guardian Council, it takes a long process to achieve the adoption of an international agreement through the NEC. This is because first the bill of accession shall be adopted by the Government, then it shall be submitted to the Parliament to be discussed and adopted in the relevant Committees and the Parliament. After being adopted, it shall be checked for constitutionality by the Guardian Council and, if it is inconsistent with the Constitution, it shall be sent back to the Parliament to remove the inconsistency. If the relevant Committees and the Parliament do not remove the inconsistency, it shall be sent to the Guardian Council again and then back to the Parliament. And finally the chairman of the Parliament can request the NEC to examine and adopt the disputed bill under Principle 112 of the Constitution.

To avoid the cumbersome process of referral to the NEC under Principle 112, it should be scrutinized whether the adoption of controversial international agreements can be performed by the NEC under Principle 110(8). If it is authorized by the Leader, the bill of such multilateral agreements including inconsistency with the Constitution, do not need to be adopted through the normal process in the Parliament and therefore can be directly referred by the Leader to the NEC to be adopted there.

So far, there has been not any international agreement adopted through the Principle 110(8) method.

4.4. How does Iran Manage Accession to Multilateral Agreements in the Case of a Conflict with Principle 139?

It was discussed in the previous chapters that, to join the WTO, Iran needs to accept or reject the WTO multilateral agreements as a whole. This rule is analyzed in chapter one (section 1.4.2. Single Undertaking Principle).¹³⁸ However it will be discussed in chapter five, since Principle 139 of Iran's Constitution stipulates some requirements related to the referral of state and public property disputes between Iran and non-Iranians to multilateral dispute settlement systems such as the WTO dispute settlement system (DSS). Under DSU rules, Iran's participation in the DSS is compulsory. This can result in a legal impediment to Iran's accession to the WTO. How Iran usually manages its accession to multilateral agreements including such a legal impediment is shortly discussed below. A detailed discussion of this issue is presented in chapters 6 and 7.

4.4.1. How Does the Conflict with the Principle 139 Arise?

As will be discussed in detail in the subsequent chapter, Iran's Constitution includes some important requirements on the settlement of disputes in non-judicial bilateral and multilateral dispute settlement systems. Under Principle 139 of Iran's Constitution, resolving state and public disputes with non-Iranians by non-judicial dispute settlement systems shall be authorized by Iran's Parliament on a case-by-case basis. This can result in a conflict with those multilateral agreements which require an automatic referral of disputes to their covered disputes settlement system. Therefore, by adopting the accession of such multilateral agreements, the Principle 139 requirement of authorization on a case-by-case basis cannot be implemented.

If the Parliament adopts a proposed accession to bilateral or multilateral agreements, including such a conflict, the Guardian Council¹³⁹ would send it

¹³⁸ The single undertaking principle is taken from Article II:2 of the WTO Agreement where it states: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.' See chapter one, section 1.4.2. (Single Undertaking Principle).

¹³⁹ See chapter 3, section 3.5.4.2. (Guardian Council) and also section 4.3.4. (Who Checks the Constitutionality in Accession Process?) in this Chapter.

back to the Parliament to remove the inconsistency with Principle 139 of the Constitution. How and with what reasoning the Guardian Council usually deals with such inconsistencies is shortly presented below.

4.4.2. What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?

For a better understanding of how the Guardian Council deals with international agreements, some General Council's reasoning on international agreements are presented (A); and then it is shortly discussed how the WTO accession can be addressed by the Guardian Council (B).

4.4.2.1. Some Guardian Council's Reasoning on International Agreements

Under Article 200 of the Rules of Procedure of the Parliament, if the multilateral agreement is sent back to the Parliament because of unconstitutionality, the reason that it includes inconsistency with Constitution shall be declared by the Guardian Council. Article 200 of Rules of Procedure states:

In case of rejecting the Parliament approvals, the Guardian Council will have the responsibility to report the reason of rejection explicitly to the Parliament so that it is immediately duplicated and distributed.¹⁴⁰

Notwithstanding Article 200 of the Rules of Procedure, by merely limiting the reasoning to a few short sentences, the Guardian Council usually does not state a detailed reasoning of why an international agreement includes an inconsistency with the Constitution. A general review of some of the reasoning stated by the Guardian Council on international agreements including inconsistency with Principle 139 of Iran's Constitution can give a better understanding of how this Council usually deals with accession to multilateral agreements. This short review can be also useful for Iran's accession to the WTO including the Dispute Settlement Understanding (DSU).

¹⁴⁰ Article 200 of the Rules of Procedure of Iran's Parliament.

On the basis of the reviewed reasoning, the Guardian Council usually reacts to the international agreements adopted by the Parliament including dispute settlement mechanisms:

- Agreements including referral to arbitration without observing Principle 139 on required authorization from the Parliament in each case.

Most multilateral and bilateral agreements (including a dispute settlement system) which have been sent back to the Parliament by the Guardian Council because of unconstitutionality, include articles on a referral to arbitration. Some of the Guardian Council reasoning on referral to arbitration are:

1. The Guardian Council opinion no. 76/21/152 dated 8 April 1997: 'Regarding Article 33 of the Convention, Government's commitment on compliance with Principle 139 of the Constitution is necessary.'¹⁴¹
2. The Guardian Council opinion no. 79/21/759 dated 23 August 2000: 'As the general wording of Article 13 includes referral of state and public properties disputes to arbitration, it is recognized as in conflict with Principle 139 of the Constitution.'¹⁴²

According to the mentioned reasoning, if a multilateral agreement includes referral of its state and public property disputes to arbitration, it would be recognized by the Guardian Council as an inconsistency with Principle 139, which should be removed by the Parliament. It bears considering that the

¹⁴¹ (Translation of the opinion S.A). This opinion of the Guardian Council was issued on Article 33 of accession of Iran to the Convention on the Contract for the International Carriage of Goods by Road (CMR) - (Geneva, 19 May 1956) which states: 'The contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention.',
<http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html#178>, last visited on 1-10-2016.

¹⁴² (Translation of the opinion S.A). This opinion of the Guardian Council was issued on Article 13 of Iran's accession to the International Convention for Safe Containers (CSC), adopted on 2 December 1972 and entered into force on 6 September 1977,
[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-Safe-Containers-\(CSC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-Safe-Containers-(CSC).aspx)<http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html#178>, last visited on 1-10-2016.

WTO dispute settlement system (DSS) includes arbitration¹⁴³ mechanisms.¹⁴⁴ Therefore, according to this reasoning and the Guardian Council's practice on the constitutionality review of a multilateral agreement, Iran's accession to the WTO, since it includes referral to arbitration, can be sent back to the Parliament.

- Agreements including the general authorization of the parties in referral to arbitration in the case of disputes. This general authorization enables Iran's Government to decide on the referral to arbitration without considering the required authorization from the Parliament for each dispute. Some of the reasoning of the Guardian Council in this regard is as follows:

1. The Guardian Council opinion no. 79/21/1391 dated 17 May 2000: 'As the general wording of Article 8(2) includes a trade dispute between Iran's Government and the Syrian Government, and is not subject to Parliament's approval (authorization), it is in conflict with Principle 139 of the Constitution.'¹⁴⁵ Under Article 8(2) of this agreement, if the relevant parties cannot resolve their dispute through peaceful means, the parties of the agreement will encourage the dispute parties to resolve the trade dispute either through arbitration if it is mutually agreed or on the basis of international arbitration rules. Subject to this article, Iran's Government can accept arbitration without an authorization from the Parliament.

2. The Guardian Council opinion no. 82/30/3248 dated 14 June 2003: 'As the general wording of Article 16 also includes referral of state and public properties (dispute) to arbitration, therefore this article is recognized as in conflict with Principle 139 of the Constitution.'¹⁴⁶ Article 16 (b) of this convention states: 'All legal disputes arising in connection with the rights and

¹⁴³ Arbitration under Article 21.3, arbitration under Article 22.6 and arbitration under Article 25 of the DSU.

¹⁴⁴ See chapter two, section 2.3.4. (The DSS Institutions and Mechanisms).

¹⁴⁵ (Translation of the opinion S.A). This opinion of the Guardian Council was issued on Article 8(2) of the Bilateral Trade Agreement between I. R. Iran and Syrian Arab Republic adopted by Iran's Parliament on 28 November 2001, <http://rc.majlis.ir>, last visited on 1-10-2016.

¹⁴⁶ (Translation of the opinion S.A). This opinion of the Guardian Council was issued on Article 16 of Iran's accession to the amendment of the Agreement Relating to International Telecommunications Satellite Organization (INTELSAT), adopted by Iran's Parliament on 20 July 2003, <http://rc.majlis.ir>, last visited on 1-10-2016.

obligations under this Agreement between a Party and a State which has ceased to be a Party or between ITSO and a State which has ceased to be a Party, and which arise after the State ceased to be a Party, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex A to this Agreement, provided that the State which has ceased to be a Party so agrees.¹⁴⁷ Therefore under this article, the Government can decide on the referral to arbitration without an authorization from the Parliament.

According to the above-mentioned reasoning of the Guardian Council, even if referral to arbitration is not compulsory and is subject to mutual consent by dispute parties, it can be recognized as inconsistent with Principle 139 by the Guardian Council.

- Agreements including referral to a judicial dispute settlement system such as the International Court of Justice. It bears mentioning that under an interpretation¹⁴⁸ issued by the Guardian Council, requirements of Principle 139 do not include referral to judicial systems.

Some of the Guardian Council opinions in this respect are: opinions no. 75/21/0453 and no. 75/21/0452 dated 16 May 1996, no. 80/21/1709 dated 5 July 2001 and no. 83/30/9593 dated 9 February 2005, among which is opinion no. 80/21/1709 which states: *'As the general wording of Article 16 also includes referral of disputes relating public and state properties to the International Court of Justice (ICJ), it is recognized as in conflict with Principle 139 of the Constitution.'*¹⁴⁹

This reasoning is arguably inconsistent with the above-mentioned interpretation (1987) of the Guardian Council on the referral of disputes to judicial systems, because the mentioned interpretation does not require the Parliament's authorization for the referral of disputes to judicial dispute

¹⁴⁷ For further information see the full text at:

https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_III_123/COO_2026_1_00_2_622486.pdf<http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html#178>, last visited on 1-10-2016.

¹⁴⁸ The interpretation of Guardian Council, no. 7484 dated 1 January 1987.

¹⁴⁹ (Translation S.A). This opinion of the Guardian Council was issued on Article 16 of the Establishment of Regional Commission for Fisheries, adopted by Iran's Parliament on 4 August 2001, <http://rc.majlis.ir>, last visited on 1-10-2016.

settlement systems. However, it can be concluded that the reactions of the Guardian Council to multilateral agreements including referral to judicial systems have been different. Sometimes some reactions are consistent with the mentioned interpretation, and sometimes they are not. It can be also asserted that the reaction can be subject to the level of importance of an agreement or the clarity of its judicial dispute settlement mechanisms. If importance is the main factor, then it can be concluded that the accession of Iran to the WTO can be recognized by the Guardian Council as inconsistent with Principle 139 because of the important legal position of the WTO covered agreements among other similar multilateral agreements. Also, if the clarity of the WTO dispute settlement system is taken into consideration by the Guardian Council, due to the quasi-judicial nature of the DSS, Iran's accession protocol would be sent back to the Parliament due to being inconsistent with Principle 139.

- Agreements including other dispute settlement mechanisms such as: conciliation, mediation, and mutually agreed solutions. In some cases, these dispute settlement methods are taken as being inconsistent with Principle 139 when they concern financial disputes.

Some of the Guardian Council opinions in this respect are: opinion no. 77/21/2788 dated 20 May 1998 which states: 'The general wordings of Sections (1) and (2) of Article 31 which also include financial disputes are recognized as in conflict with Principle 139 of the Constitution.'¹⁵⁰ Article 31 of the Convention on Psychotropic Substances (1971) is not restricted to arbitration and includes several kinds of dispute settlement mechanisms which are: negotiation, investigation, mediation, conciliation, arbitration, recourse to

¹⁵⁰ (Translation of the opinion S.A). This opinion of the Guardian Council was issued on Sections (1) and (2) of Article 31 of the Convention on Psychotropic Substances (1971): '1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.'
2. Any such dispute which cannot be settled in the manner prescribed shall be referred, at the request of any one of the parties to the dispute, to the International Court of Justice for decision.', https://www.unodc.org/pdf/convention_1971_en.pdf, last visited on 1-10-2016.

regional bodies, judicial process, International Court of Justice and other peaceful means of their own choice. Therefore, the dispute settlement methods covered by this Convention are almost similar to those in the WTO dispute settlement system, even though the functions of the DSS mechanisms, as described in chapter two, would be different.¹⁵¹

To conclude, this reasoning can also be regarded as emphasizing this opinion that Iran's WTO accession protocol can be sent back by the Guardian Council to the Parliament because of the inconsistency between the DSS mechanisms (as described in chapter two)¹⁵² and the requirements of Principle 139 of Iran's Constitution.

4.4.2.2. WTO Accession Focus

The Guardian Council opinions and reasoning on Principle 139 include various kinds of dispute settlement mechanisms and are not restricted to arbitration. Therefore, by taking the Guardian Council's reasoning and practice regarding multilateral agreements into account, it can be concluded that Iran's accession to the WTO, including the DSU which contains dispute settlement mechanisms such as: consultations, panel proceeding, Appellate Body review, arbitration, good offices, conciliation and mediation,¹⁵³ can be declared by the Guardian Council as being inconsistent with Principle 139 of Iran's Constitution. It bears considering that, by acceding to the WTO and under WTO law, Iran's participation in the WTO covered disputes with other WTO Members is compulsory.¹⁵⁴ However, Principle 139 of Iran's Constitution requires an authorization from the Parliament for each referral of a dispute to the dispute settlement mechanisms. This will be discussed in more detail in the subsequent chapter.

After discussing Iran's adoption process for international agreements and the reasoning of the Guardian Council on some agreements including inconsistency with Principle 139 of Iran's Constitution, it is discussed below how the inconsistency with Principle 139 can be resolved.

¹⁵¹ See chapter two, section 2.3.4. (The DSS Institutions and Mechanisms).

¹⁵² Chapter two, *ibid*.

¹⁵³ *Ibid*.

¹⁵⁴ See chapter two, section 2.3.5. (The WTO Dispute Settlement Process).

4.4.3. How Can the Conflict with Principle 139 be Resolved?

When accession to a multilateral agreement is adopted by Iran's Parliament, it will be sent to the Guardian Council for the constitutionality review. One of the issues which can result in sending an agreement back to the Parliament by the Guardian Council can be because of its inconsistency with Principle 139.

To avoid unconstitutionality, the Government and the Parliament can formulate reservations. Article 8 of the *Regulation on How to Draft and Conclude International Agreements* (29 May 1992) and Article 16(c) of the *Instruction on How to Draft International Legal Agreements* (2011) have stated rules on how to formulate reservations to international agreements.

Under Article 8 of the Regulation, before proposing the adoption of an accession or accepting a multilateral agreement, a governmental organization (proposer of the agreement to the Government) shall, on the basis of Iran's national expediency and interest, perform the required studies as to whether to formulate a reservation or not and then shall propose to the Board of Ministers the agreement, as well as a comprehensive report on the reasons as to why it is necessary or not to formulate a reservation.¹⁵⁵ Also, Article 16(c) of the Instruction provides that one of the requirements before approving, accepting, or joining multilateral agreements is to coordinate with the Legal Vice President and the Foreign Affairs Ministry regarding whether to formulate a reservation or not. Therefore, the Government can add a reservation clause to the adopted bill to which the multilateral agreement is annexed and then the bill shall be submitted to the Parliament.¹⁵⁶

In the Parliament's multilateral agreement adoption process, reservations can be formulated to avoid or remove any unconstitutionality. Under Article 196 of the Rules of Procedure of the Parliament, the warning on unconstitutionality shall be announced before the final voting. If it is accepted, a reservation can be issued either by the Parliament or by the

¹⁵⁵ Article 8 of the Regulation on How to Draft and Conclude International Agreements (29 May 1992).

¹⁵⁶ See section 4.3.2. (Negotiation and Signature by the Government) in this chapter.

relevant committee.¹⁵⁷ Formulating a reservation in the Parliament also happens after the Guardian Council sends back a multilateral agreement to the Parliament to remove its inconsistency with the Constitution.¹⁵⁸

Usually when there is an issue of unconstitutionality in a multilateral agreement with regard to Principle 139 of the Constitution, it can be removed through reservations which are formulated by the Government or the Parliament. Some relevant instances were presented earlier in this chapter on adoption process of multilateral agreements in the Parliament and the Guardian Council.¹⁵⁹

Now, the important question is whether Iran can formulate a reservation if the unconstitutionality of Principle 139 arises with regard to the accession of Iran to the WTO. This is shortly presented in the following section.

4.4.4. Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?

After the Guardian Council sends a multilateral agreement back to the Parliament because of an inconsistency with Principle 139, the Parliament can formulate a reservation to remove this inconsistency. Also, before the constitutionality is checked by the Guardian Council, the Government or the Parliament can formulate reservations to avoid unconstitutionality.

However, according to an opinion (83/30/9593) issued by the Guardian Council, if a multilateral agreement does not accept a reservation, the Guardian Council does not recognize such a reservation either.¹⁶⁰ Therefore, a reservation in this case cannot remove the unconstitutionality.

The Guardian Council in its opinion no. 83/30/9593 dated 9 February 2005 states: 'Considering that Article 27 of the Convention has explicitly stated that no reservation can be accepted to this Convention, the formulated

¹⁵⁷ Article 196 of its Rules of Procedure of the Parliament, see section 4.3.3. (Parliament's Approval in the Accession Process) in this chapter.

¹⁵⁸ For further information see the relevant section in this chapter.

¹⁵⁹ See section 4.3.3. (Parliament's Approval in the Accession Process) and section 4.3.4. (Who Checks the Constitutionality in Accession Process?) in this chapter.

¹⁶⁰ See the Guardian Council website.

reservation is not effective and therefore, acceptance of the convention is in conflict with Principle 139 of the Constitution.¹⁶¹

Article 8 (Note 2) of the *Regulation on How to Draft and Conclude International Agreements* (1992) states that if a reservation either is prohibited by an international agreement or is incompatible with the object and subject of the agreement, if necessary, the (relevant) governmental institution shall draft an interpretive declaration/statement including Iran's interpretation of the agreement in the view of its national expediency and interest and shall submit it to the Board of Ministers.¹⁶² Therefore if a reservation is prohibited, the Regulation (1992)¹⁶³ calls for formulating an interpretive declaration/statement to remove the unconstitutionality.

However, the Guardian Council, in its opinion no. 84/30/11702 dated 30 April 2005, has rejected the method of interpretative declaration to remove an inconsistency with Principle 139 if the reservation is not accepted by an agreement.¹⁶⁴ Accession to this multilateral agreement was finally adopted on 29 October 2005 by the National Expediency Council.¹⁶⁵

¹⁶¹ (Translation of the opinion S.A). This opinion of the Guardian Council was issued on accession of Iran to the Stockholm Convention on Persistent Organic Pollutants (22 May 2001), Article 27 of the Convention states: 'No reservations may be made to this Convention.'

¹⁶² Note 2 of Article 8 of the Regulation on How to Draft and Conclude International Agreements (29 May 1992).

¹⁶³ The Regulation on How to Draft and Conclude International Agreements (1992).

¹⁶⁴ This opinion was issued with regard to the accession of Iran to the WHO Framework Convention on Tobacco Control (adopted by the World Health Assembly on 21 May 2003 and entered into force on 27 February 2005), Article 30 of the Convention states: 'No reservations may be made to this Convention.', Article 27 states: '1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.'

2. When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc

To conclude, if the accession of Iran to the WTO is blocked in its adoption process because of an inconsistency with Principle 139 of Iran's Constitution, a reservation or an interpretative declaration would not be the best solution to remove the mentioned inconsistency. A better solution would be found through the National Expediency Council and on the basis of Principle 112 of Iran's Constitution and will be discussed in the subsequent chapters.

4.5. Conclusion

Under Iran's Constitution, to join a multilateral agreement/organization such as the WTO, there is a detailed adoption process. Domestic rules on how Iran's Government can negotiate and sign multilateral agreements were introduced. Also, it was discussed how a bill on accession to a multilateral agreement can be adopted by Iran's Board of Ministers.

After a bill of accession to a multilateral agreement is adopted by the Government, it shall be submitted to the Parliament. According to the Parliament's Rules of Procedure, the multilateral agreements should be discussed and adopted by the relevant Committees of the Parliament through the one-reading method. However, the important agreements, such as Iran's WTO accession protocol, can be adopted through the two-reading method. It has been discussed that the Government and the Parliament can check the constitutionality and in case a multilateral agreement is inconsistent with the Constitution, reservations can be formulated to remove the inconsistency. However, the constitutionality review task is basically given by the Constitution to the Guardian Council.

The relevant rules on the constitutionality review by the Guardian Council and how a multilateral agreement which is recognized as inconsistent can be adopted have been discussed. When unconstitutionality is at issue, the

arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.',

<http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf>, last visited on 1-10-2016.

¹⁶⁵ <http://rc.majlis.ir/fa/law/show/97946?keyword=%DA%A9%D9%86%D9%88%D8%A7%D9%86%D8%B3%DB%8C%D9%88%D9%86%20%DA%86%D8%A7%D8%B1%D8%A7%D9%88%D8%A8%20%D8%B3%D8%A7%D8%B2%D9%85%D8%A7%D9%86%20%D8%A8%D9%87%D8%AF%D8%A7%D8%B4%D8%AA>, last visited on 1-10-2016.

multilateral agreement is sent back to the Parliament to remove the inconsistency. If, because of safeguarding the national interest, the Parliament cannot remove the inconsistency, the agreement can be referred to the National Expediency Council by the Head of the Parliament or the President (Head of the Executive) to be adopted there.

It has been analyzed in this chapter that the NEC can disregard an inconsistency of a multilateral agreement with the Constitution. However, in accordance with an interpretation issued by the Guardian Council, an inconsistency with Islamic rules cannot be ignored if an issue is referred to the NEC under Principle 112.

Resolving the dispute between the Parliament and the Guardian Council on unconstitutionality is not the only method to adopt a multilateral agreement which includes unconstitutionality. Under Iran's Constitution, the Leader can also refer an issue to the NEC which cannot be adopted through the conventional method (i.e. by the Parliament). Even though, so far, no multilateral agreement has been referred by the Leader to the NEC for adoption, under this method (Principle 110(8)), an issue being inconsistent with Islamic rules can also be adopted. This is because the decision of the NEC under Principle 110(8) shall also be adopted by the Leader to be enforced.

Several types of reasoning of the Guardian Council on inconsistency of the agreements with Principle 139 on referral of state and public property disputes to multilateral dispute settlements have been addressed, including that the Guardian Council believes that to remove an inconsistency with Principle 139 a reservation cannot be formulated if the multilateral agreement (as it is the case with regard to the WTO DSU) has banned such a reservation. It is also discussed that sometimes the Guardian Council, in dealing with multilateral agreements, has recognized the referral of disputes to multilateral judicial systems - such as the International Court of Justice - as inconsistent with Principle 139, even though according to an interpretation issued by the GC, judicial systems have been excluded.

It will be discussed in the subsequent chapter whether the inconsistency between the WTO DSU and Iran's Constitution can be resolved through the legal interpretations of Principle 139.

Chapter 5: Detailed Analysis of Principle 139

5.1. Introduction

It was discussed in chapter one that, to join the World Trade Organization, there is an accession process which was started by Iran in 1996. This accession process includes some specific obligations such as the single undertaking principle. This principle states that WTO multilateral agreements are an '*inseparable package of rights and disciplines*'¹ in regard to which Iran – among other acceding countries – shall '*take it all, or leave it all*'.²

One of the WTO multilateral agreements to which Iran shall join in its accession to the WTO is the Dispute Settlement Understanding (DSU). The nature of the WTO dispute settlement system (DSS) and its dispute mechanisms were discussed in chapter two. Also, it was discussed that the DSS has a compulsory jurisdiction³ with regard to all WTO agreements. This compulsory jurisdiction, as discussed in chapter three and four – due to the adoption process of multilateral agreements by Iran's constitutional institutions – can result in a legal impediment to Iran's accession to the WTO.

To remove this legal impediment, this chapter first focusses on the two main legal issues of the conflict between Iran's Constitution and the WTO DSU which are: (1) referral to arbitration or judicial systems; and (2) case-by-case approval approach or *blanco* approval approach. (5.2.1)

After analyzing the aforementioned legal issues, the interpretations of Principle 139 of Iran's Constitution are introduced to recognize whether the discussed legal impediment to accession can be removed in that way (5.3). The

¹ See the WTO Appellate Body Report on Argentina – Footwear (EC) (2000), para. 81.

² Presentation of Mr. Ahamad Thougan Hindawi to the WTO General Council on 29, 30 and 31 January 2013 (Appointment of the next Director general- Meeting with candidate, WTO Document: JOB/GC/34, p. 6.

³ The Compulsory jurisdiction of the DSS means that the parties to a WTO covered agreement dispute do not need to agree on the jurisdiction of the DSS. And if a WTO Member takes a complaint on WTO covered agreements before the DSS, the consultations will automatically start and the responding party shall participate in the dispute settlement process.

interpretations under discussion are: literal (5.3.1), historical (5.3.2), authentic (5.3.3), systemic (5.3.4), teleological (5.3.5), and doctrinal (5.3.6) interpretations.

After an examination of the legal interpretations to remove the legal conflict on the basis of Principle 139, first it is examined whether Principle 139 is limited to private or governmental entities (5.4.1), then a view supporting that there is no conflict between Iran's Constitution and the WTO DSU on the basis of Principle 139 (5.4.2) is put forward. Finally, some other legal impediments of accession including Iran's legal view on the recognition of non-Muslim judges in multilateral dispute settlement systems such as the DSS are shortly presented in this chapter (5.4.3-5.4.4).

A detailed discussion of the practical implementation of Principle 139 will be discussed in chapter six.

5.2. Detailed Analysis of Principle 139 of Iran's Constitution

As discussed in the previous chapters, Iran applied for accession to the WTO in 1994. However, it is not a member yet. The prolonged process can be due to various impediments, among which a legal impediment is the main focus of this dissertation.

It was discussed in previous chapters that the accession of Iran to a multilateral agreement can be prolonged and even blocked if it includes an inconsistency with Iran's Constitution. This is called a legal impediment to accession. The first question of this research is to recognize whether there is a legal impediment to Iran's WTO accession. As discussed in chapters two and three, the legal impediment, which can prolong or block Iran's accession to the WTO, can be due to a conflict between the WTO Dispute Settlement Understanding (DSU) and Iran's Constitution. Principle 139 of Iran's Constitution includes some requirements which need to be observed when acceding to a multilateral agreement/organization such as the WTO that contains one of the following issues:

- involving in state and public property with non-Iranians⁴; and
- including dispute settlement mechanisms.

⁴ The term 'non-Iranians' includes both governmental and non-governmental entities.

The Principle 139 requires:

- that disputes shall be authorized by the Parliament to be referred to dispute settlement mechanisms; and
- that this referral shall be authorized on a case-by-case basis.

Therefore, under Principle 139 of the Constitution, if Iran joins a multilateral agreement, the covered state and public property disputes can only be resolved if they are authorized in each case by the Parliament. However, as discussed in chapter two, this case-by-case approval requirement is in conflict with WTO law. Under WTO law, to resolve a dispute between WTO Members, they do not need to accept the jurisdiction of the dispute settlement system (DSS). This is because under the single undertaking principle, by joining the WTO, a state (or separate customs territory) has already accepted the compulsory jurisdiction of the DSS regarding the WTO agreements.⁵ Under the compulsory jurisdiction of the DSS, if the complainant takes a WTO dispute to the DSS, the responding party cannot escape that jurisdiction.⁶ This would be in conflict with Principle 139 of Iran's Constitution requiring a case-by-case authorization by the Parliament for Iran as a responding party to a WTO dispute. And as discussed in chapters three and four, such a legal conflict can impede Iran's accession to multilateral agreements/organizations such as the WTO.

Removing such a legal impediment, which is the focal point of the second research question of this dissertation, requires a detailed discussion of interpretations of Principle 139 of Iran's Constitution. This chapter discusses first the key legal issues of Principle 139 and then the interpretations are presented.

5.2.1. Key Legal Issues

To remove the legal impediment of Iran's accession to the WTO, there are two significant legal issues which should be taken into consideration. These legal issues are presented below on the basis of legal interpretations of Principle 139 of Iran's Constitution: referral to arbitration or judicial systems (1); and a case-by-case approval approach or *blanco* approval approach (2).

⁵ See chapter one, section 1.4.2. (Single Undertaking Principle).

⁶ For further information on compulsory jurisdiction of the WTO DSS see chapter two, section 2.3. (Nature of the WTO Dispute Settlement System (DSS)).

5.2.1.1. *Legal Issue (1): Referral to Arbitration or Judicial Systems*

The first legal issue regarding the conflict between the WTO dispute settlement system and Principle 139 of Iran's Constitution concerns the scope of the requirement of a referral to dispute settlement mechanisms. Principle 139 states: 'Resolving the litigation related to public and state property or referring it to arbitration'. According to this wording of Principle 139, the requirement of authorization from the Parliament includes two kinds of referral to dispute settlement mechanisms:

- resolving the litigation (generally including all kinds of dispute settlement mechanisms);
- referring the dispute to arbitration.

Therefore, from a literal interpretation point of view, the wording of Principle 139 states that the requirement of authorization is not restricted to referral to arbitration. If the requirement were meant to be restricted to referral to arbitration, what would be the meaning of 'resolving the litigation...or'? That is to say that the term 'or' clearly addresses two kinds of dispute settlement methods without excluding any mechanism of dispute resolution. This is also what can be understood from the wording in Farsi.

The terms '*solh*' (resolving) and '*daavi*' (litigation) in Farsi and their combination refers to resolving a dispute through dispute settlement methods. And, as it can be understood from *Dehkhoda*,⁷ which is the most known Farsi encyclopedia in Iran, this wording does not exclude judicials method of dispute settlement from the requirement of the Parliament's authorization which is stated by Principle 139.

By examining the mentioned wording of Principle 139 from a historical interpretation, it can be recognized that in the codification process of this Principle, Members of the *Assembly of Experts for Constitution*⁸ did not intend

⁷ *Dehkhoda Encyclopedia* is a detailed encyclopedia for Farsi words. For further information see A.A. Dehkhoda, "Dehkhoda Encyclopedia [الغنتامه دهخدا]", (Tehran University Press, 1958), (Translation S.A).

⁸ See section 5.3.2. "Historical Interpretation" in this chapter.

to restrict the authorization requirement to merely referral to arbitration.⁹ As clarified later in this chapter,¹⁰ some Members of the Assembly had even more radical suggestions which were finally almost balanced.¹¹ It bears mentioning that in the codification of Iran's Constitution, resolving the disputes with non-Iranians through arbitration was given more consideration by the Members of the Assembly as it is evidenced in their discussions. However, it cannot be inferred from the Assembly's discussions that the adopted required authorization was restricted to arbitration. If such a restriction had been intended, it would have sufficed to merely stating 'referral to arbitration' in the wording of Principle 139. In other words, there is a legal principle in Iran's public law which says 'the Legislature is wise',¹² meaning that all legal terms in the wording adopted by the Legislature are intended and cannot be put aside in interpretation. Therefore, in interpreting Principle 139, the term: '*resolving the litigation*' in the wording of the mentioned Principle should also be taken into account.

Nevertheless, from an authentic interpretation point of view, it bears noting that in 1987 the Guardian Council¹³ issued an interpretation in response to a question on Principle 139 which states that taking a claim regarding state and public property to court does not fall within the scope of the Principle 139.¹⁴ Since then, this interpretation has been the main criteria in Iran's legal system to examine whether a multilateral agreement including dispute settlement mechanism is covered by the requirement of Principle 139, even though, as

⁹ Iran's Assembly of Experts, *Final Discussions Negotiations of Assembly of Expert for Constitution* (Forty Eighth Session), [صورت مشروح مذاکرات مجلس بررسی نهایی قانون اساسی], vols., vol. 2 (Iran's Parliament Publications, 1985), pp. 1307-1308.

¹⁰ See section 5.3.2. (Historical Interpretation).

¹¹ For instance, some members of the Assembly declared radical suggestions on forbidding any kind of referral of public and state property issues to arbitration, except for domestic arbitrations. Most of these radical suggestions were finally rejected by the Assembly, Iran's Assembly of Experts for Constitution (1985), pp. 1307-1308.

¹² It is almost similar to the rule of '*Presumption against Absurdity*' which means the Legislature does not intend an absurdity. See: H.C. Black, *Handbook on the Construction and Interpretation of the Laws, with a Chapter on the Interpretation of Judicial Decisions and the Doctrine of Precedents* (The Lawbook Exchange, Ltd, 2011), p. 104.

¹³ The Guardian Council is a constitutional institution which under Principle 98 of the Constitution is granted the task of interpreting the Constitution. See chapter three, section 3.5.4. (Legislature).

¹⁴ Interpretation No. 7484 dated 01-01-1987, (Translation S.A), for further information see the Guardian Council's website at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

discussed in chapter four,¹⁵ the Guardian Council has sometimes considered the multilateral agreements including a referral to international courts as inconsistent with Principles 139.¹⁶ This is because it can be asserted that in Iran's Guardian Council there is no specific binding legal precedent recognized yet, even though the interpretations issued by the Council have the same legal position as the original principles of the Constitution.¹⁷

From a systemic interpretation point of view, there are some legislations adopted by the Parliament such as *Iran's Civil Procedure Code*¹⁸ (2000) and the *Law on International Commercial Arbitration*¹⁹ (1997) which are adopted on the basis of the aforementioned interpretation No. 7484 of the Guardian Council which has restricted the authorization requirement of Principle 139 merely to arbitration. In Iran, these two legislations have established the practical legal framework for the referral of state and public disputes to settlement mechanisms. These legislations will be discussed in chapter six (section 6.2.1. Enforcement of Principle 139 by Iran's Parliament).

A teleological interpretation of Principle 139 reveals the main reasoning for the adoption of the requirements of Principle 139. A close examination of the relevant codification discussions leads to the conclusion that further clarification for avoiding corruption in bilateral, multilateral and international dispute settlement system process has been the main purpose for the authorization requirement. The Government, through informing the representatives of the people in the Parliament, can enable them to perform a kind of parliamentary supervision (see the relevant discussion in chapter three) on how the state and public property disputes can be resolved. Lack of such supervision in practice over the settlement of state and public disputes in international arbitration has resulted into a significant amount of

¹⁵ See chapter four, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

¹⁶ For instance, the Guardian Council opinions no. 75/21/0453 and no. 75/21/0452 dated 16 May 1996, no. 80/21/1709 dated 5 July 2001 and no. 83/30/9593 dated 9 February 2005.

¹⁷ Under Iran's Constitution Principle 98: 'The interpretation of the constitution is the responsibility of the Guardian Council. This is determined with the approval of three-fourths of its members.'

¹⁸ [قانون آیین دادرسی مدنی], (Translation S.A).

¹⁹ [قانون داوری تجاری بین المللی], (Translation S.A).

corruption.²⁰ However, it is doubtful whether this supervision is also necessary with regard to the referral of disputes to some international and multilateral judicial systems, such as the International Court of Justice. Therefore, it can be concluded from a teleological interpretation that the referral of disputes to international and multilateral judicial dispute settlement systems, as it is also clarified by the interpretation No. 7484 of the Guardian Council, is not covered by the authorization requirement of Principle 139. It bears considering that the WTO DSS is a quasi-judicial²¹ dispute settlement system and not merely judicial or arbitral. Therefore, the DSS stays under cover of the Parliament's authorization required by Principle 139.

Interpretation No. 7484, which restricts the authorization requirement to arbitration, has been criticized by in the literature. For instance, Eskini and Shahbazi Nia believe that the authorization requirement stated by Principle 139 includes both arbitration and other dispute settlement mechanisms including the judicial systems.²² The main argument for this view is that general wording of Principle 139 is not restricted by the Legislature (Assembly of Experts for the Constitution) to any particular mechanism, although emphasis is put on arbitration.

In conclusion, as mentioned above, some legal interpretations support the inclusion of merely arbitration by the parliamentary authorization of Principle 139. Others hold a broader interpretation which includes all mechanisms, as well as the international judicial dispute settlement systems.

In addition to the above-mentioned legal issue, there is another important legal issue that is presented below. This issue concerns the question on whether Principle 139 requires a case-by-case or a *blanco* authorization from the Parliament.

²⁰ For instance, see Iran's gas dispute with Sharjah's Crescent Petroleum, <http://www.thenational.ae/business/energy/irans-gas-dispute-with-sharjahs-crescent-petroleum-enmeshed-in-politics>, last visited on 1-10-2016.

²¹ See chapter two, section 2.3.7. (Quasi-judicial - Is the nature of the DSS mechanisms judicial or arbitration).

²² See section 5.3.6. (Doctrinal Interpretation) in this chapter.

5.2.1.2. *Legal Issue (2): Case-by-Case Approval Approach or Blanco²³ Approval Approach*

The second legal issue considers whether the required authorization from the Parliament for accession to multilateral agreements, that includes a dispute settlement system, should be done through a case-by-case approval approach or whether a *blanco* approval approach would suffice. For a better clarification of this issue and also to achieve a more practical result, some legally relevant interpretations are presented below.

Principle 139 states: '*Resolving the litigation related to public and state property or referring it to arbitration is contingent, in each case...*'. Using a literal interpretation, the term '*in each case*' suggests that a case-by-case approval approach was meant. This is because the term: '*in each case*' should be literally interpreted on the basis of its conventional legal meaning. In Iran's legal system, there is a legal principle for interpretation which says: the terms (stated in legislation) shall be taken on the basis of their customary meaning.²⁴ This principle is also stated in Article 224 of Iran's Civil Code: '*The wording of a contract shall be read according to the meaning understood by customary law.*'²⁵ Therefore, the term '*in each case*' stated in Principle 139 of the Constitution should be taken on the basis of its customary meaning which is legally and logically different from a *blanco* approval approach understanding. This is also what can be inferred from the historical background of Principle 139. A close consideration of the codification discussions of Principle 139 in the Assembly of Experts for Constitution evidences that a case-by-case approval approach was also meant by the Members of the Assembly.²⁶ For instance, Golzaade Ghafouri, who was a Member of the Assembly warns on giving the full control – of settlement of public and state disputes – to the Government. He emphasizes that the referral of settlement – in each case – shall be

²³ A *blanco* approval approach means that adoption of an agreement (including dispute settlement mechanisms) by the Parliament also includes a general authorization for the referral of all covered disputes to dispute settlement systems. Therefore, under this approach a case-by-case authorization by the Parliament is not necessary.

²⁴ This legal principle in Farsi is: [الفاظ حمل می شوند بر معانی عرفیه], (Translation S.A).

²⁵ Article 224 of Iran Civil Code, English translation of Iran's Civil Code at: http://www.wipo.int/wipolex/en/text.jsp?file_id=197898, last visited on 10-3-2017.

²⁶ Assembly of Experts (1985), pp. 1307-1308.

authorized by the Parliament.²⁷ Therefore, a *blanco* approval approach cannot be consistent with the intended meaning of the adopted Principle 139.

The Guardian Council which is the only constitutional institution that can interpret the Constitution has not clarified whether the term: '*in each case*' can entail a *blanco* approval approach. It bears mentioning that, in declaring its views on the constitutionality of the adoption of bilateral and multilateral agreements by the Parliament, the Guardian Council sometimes has taken a *blanco* approval approach to be inconsistent with Principle 139 and sometimes not. Therefore, under an authentic interpretation, it is not clear which approval approach prevails. For a further discussion, see chapter four²⁸ and chapter six.²⁹

A teleological interpretation insists on a case-by-case approval of the required authorization by the Parliament. This approach can make the supervision of the Parliament more efficient to avoid any corruption that may take place in the process of bilateral or multilateral arbitration or other methods of dispute settlement, especially if diplomatic mechanisms³⁰ are involved.³¹

Using a systemic interpretation, it should be taken into consideration that sometimes there is a difference between the approval approaches which are practiced by the Parliament and the Government. For instance, the Government has applied a *blanco* approval approach for most bilateral and multilateral agreements, such as the agreements on the Iran-United States Claims Tribunal' (19 January 1981),³² even though the Head of the Parliament and some Parliament Members, as it will be discussed in the subsequent chapter, had required a case-by-case approval approach for the referral of disputes to the Tribunal. Later, the *blanco* approval approach, which was

²⁷ See Golzaade Ghafouri's quote in chapter five, section 5.3.2. (Historical Interpretation).

²⁸ See chapter four, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

²⁹ See chapter six, section 6.2. (Principle 139 in Practice).

³⁰ Diplomatic or political mechanisms include mechanisms such as: consultations, good offices, conciliation, mediation, and mutually agreed solutions.

³¹ Sometimes in diplomatic mechanisms the proceedings and the negotiations are not disclosed and the national interest can be bargained or sacrificed.

³² The 'Algiers Declarations' includes the 'General Declaration' and 'Claims Settlement Declaration' agreements which were agreed upon by the two countries in 1981.

practiced for several decades by the Government with regard to settlement, via the Iran-United States Claims Tribunal was criticized by the Parliament in 2008. This is also discussed in detail in chapter six.³³

There are also some discussions among Iranian legal experts on whether the Parliament's authorization can be requested after concluding an agreement. In other words, before an agreement is concluded, an authorization on the referral to dispute settlement mechanisms can be requested from the Parliament. However, when an agreement is concluded, how effective would it be to request the Parliament's authorization in case Iran is a responding party to a dispute and its participation is compulsory. As Mir Abbassi says, if a dispute arises after a contract is signed, the other party, whether we like it or not, can refer the dispute to international settlement systems.³⁴ Therefore, it can be asserted that, using a doctrinal interpretation, some scholars do not recognize the case-by-case approval approach due to the fact that it cannot benefit the Iranian party as a responding party to a dispute. This view is also accepted by international arbitral practice.³⁵ For further discussions see chapter six.³⁶

To conclude, the wording of Principle 139 requires a case-by-case approval approach. In practice, however, in most cases, a *blanco* approval approach has been followed by Iran's Government and also international arbitrations.

The key legal issues of the legal impediment regarding Principle 139 were discussed. To recognize whether the legal interpretations of Principle 139 can remove the legal impediment, a detailed discussion is presented below.

³³ See chapter six, section 6.3.2.1. (The Iran-United States Claims Tribunal and Principle 139).

³⁴ S.B. Mir Abbassi, "The Problem of International Contracts under Principles 77 and 139 of Iran's Constitution [مسئله قراردادهای بین المللی موضوع اصل 77 و 139 قانون اساسی جمهوری اسلامی ایران]", *Faculty of Law Journal of Tehran University* [مجله دانشکده حقوق و علوم سیاسی], (1999), p. 43.

³⁵ J. Seifi, "The New International Commercial Arbitration Act of Iran -Towards Harmony with the UNCITRAL Model Law", *Journal of International Arbitration* (1998), p. 33.

³⁶ See chapter six, section 6.3. (Principle 139 of Iran's Constitution in International Arbitrations).

5.3. Legal Interpretations of Principle 139

To remove the legal impediment to WTO accession, the possible solutions should be analyzed. One of the possible solutions to remove this legal impediment can be reached through the legal interpretations of Principle 139 that are presented below. Therefore, first the literal interpretation (5.3.1), is discussed. Then the historical (5.3.2), authentic (5.3.3), systemic (5.3.4), teleological (5.3.5), and doctrinal (5.3.6) interpretations are presented.

5.3.1. Literal Interpretation

There are some requirements on dispute settlement which are stated in Principle 139 of Iran's Constitution. This Principle states:

Resolving the litigation related to public and state property or referring it to arbitration is contingent, in each case, upon the approval of the Board of Ministers, and must be communicated to the Assembly. In cases where the party to the dispute is a foreigner and in important internal cases, it must also be approved by the Assembly. The law determines the important cases.³⁷

The wording of Principle 139 limits all '*settlements of claims*' to a few requirements, such as to an authorization from the '*Board of Ministers*' and, under other requirements, an authorization from the '*Assembly*' (the Parliament). There are, however, debates regarding the wording of this Principle. The wording of this Principle clearly states that a claim arising between an Iranian entity and a non-Iranian relating to a public or governmental property can be settled through arbitration and also other methods of dispute settlement³⁸ if it is approved by Iran's Parliament in advance. This implies that once Iran would have acceded to the WTO, Iran could only be a party to a dispute settlement case affecting Iranian 'public or state property'³⁹ if its participation is approved by Iran's Parliament. If the

³⁷ Principle 139 of Iran's Constitution.

³⁸ For further information about the WTO dispute settlement mechanisms see chapter two, section 2.3.4. (The DSS Institutions and Mechanisms). And to see whether those mechanisms are judicial or non-judicial see section 2.3.7. (Quasi-judicial).

³⁹ A 'public property' means a property which belongs to the people but is under the government's control, as in rivers, mountains, forests etc. And a 'state property' means

Parliament authorizes this participation (the referral of a dispute to the WTO dispute settlement system), Iran can start negotiations of settlement, for example through consultations. This is in conflict with the compulsory jurisdiction of the WTO dispute settlement system.⁴⁰

An important question on the definition and scope of the 'public or state property' is, for instance, whether a dispute on the consistency of an Iranian law with obligations under the WTO Sanitary and Phytosanitary Measures (SPS) Agreement be a dispute relating to public and state property?

To answer this question, it bears considering that even if only a dispute 'can' be relevant to state or public properties, the protocol of accession shall be adopted on the basis of requirements stated by Principle 139.⁴¹ This is what can be inferred from the practice of Iran's Guardian Council in dealing with multilateral and bilateral agreements. Regarding the SPS Agreement, almost similar to the WTO dispute DS26 (European Communities Measures Concerning Meat and Meat Products (Hormones))⁴², after Iran's accession to

a property which belongs to the government and is also under its control, such as a governmental bank.

⁴⁰ The compulsory jurisdiction means every WTO Member enjoys assured access to the dispute settlement system and no responding Member can escape its jurisdiction. For further information on the compulsory jurisdiction see chapter two, section 2.3. (Nature of the WTO Dispute Settlement System (DSS)).

⁴¹ It bears mentioning that Some disputes under WTO law must be considered to be disputes concerning state and public property. A dispute about the level of import duties can probably quite easily be regarded as a dispute concerning state and public property, as would a dispute regarding internal taxation on imported products. But there can be other disputes that would not be considered to be disputes regarding state and public properties. With the accession of Iran to the WTO, all WTO disputes, including those on state and public property, should be taken to the WTO DSS. However, to participate in state and public property disputes, Iran's Government needs an authorization from the Parliament, which is in conflict with the DSS compulsory jurisdiction.

⁴² WTO DS26: on 26 January 1996, the United States requested consultations with the European Communities claiming that measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action restrict or prohibit imports of meat and meat products from the United States, and are apparently inconsistent with Articles III or XI of the GATT 1994, Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and Article 4 of the Agreement on Agriculture. For further information see WTO website:

the WTO, a WTO Member can claim that the measures taken by Iran are to support Iranian companies in the relevant fields. The most important stock breeding companies in Iran are still under the control of state or public organizations. Thus, if a dispute is taken to the DSS, Iran, as a responding party, would be asked to remove or amend its measures. This can negatively influence Iran's national interest; for instance it can result in the failure/bankruptcy of some state or public-owned companies. Therefore, for participation in such a dispute, an authorization from the Parliament is required. Due to this fact that many Iranian companies are still state or publically owned, a case-by-case authorization would be required for the settlement of most disputes under the WTO agreements. If the Parliament does not authorize the Government to participate in such disputes, Iran cannot avoid the legal consequences. For a better understanding of what the requirements of Principle 139 are, a short review of the literal interpretation of this Principle is presented below.

From a literal interpretation point of view, a number of legal questions arise regarding the terminology used in Principle 139 such as '*claim*', '*referral to arbitration*', '*public and state property*', and '*assembly*'. These terms are addressed below.

I. What is meant by the term: '*claim*'? Does it include all kinds of claims in general? This concern is raised due to the different meanings of '*claim*' in Farsi. According to the Iranian legal system, a claim can have at least two meanings: general and specific. In general, '*claim*' means just an assertion, but the specific meaning refers to a judicial claim, i.e., a claim in a law suit before a court. That is why it is argued by a few Iranian legal experts⁴³ that, as we have this term in other principles of Iran's Constitution, such as Principles 35⁴⁴,

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm, last visited on 1-10-2016.

⁴³ For further information see: M. Shahbazi-Nia, *Settlement of Foreign Investment Disputes 'A Comparative Analysis'* [نظام حل و فصل اختلافات ناشی از سرمایه گذاری خارجی (مطالعه تطبیقی)], (Institute for Trade Studies & Research [موسسه مطالعات و پژوهشهای بازرگانی], (2007). p. 250.

⁴⁴ Iran's Constitution Principle 35: 'In all courts of law, the opposing parties to a dispute (claim) have the right to choose an attorney for themselves. If they cannot afford to hire an attorney, they should be provided with the means to do so.'

165⁴⁵ and 167,⁴⁶ and it is used as a lawsuit,⁴⁷ therefore, in this view, the term 'claims' in Principle 139 is limited to the meaning of a claim in a lawsuit. In other words, if a claim is first sent to a court and then its parties want to settle it through arbitration (or another non-judicial methods of dispute settlement), then they should get an authorization from the Parliament. Therefore, the question is whether the Principle can cover a case which is not brought to a court and is initially going to be settled through, for instance, arbitration?

This argument, that is based on a narrow interpretation of the word '*claims*', is not accepted by other legal experts⁴⁸ because it is not consistent with the drafting negotiations of the Constitution and also with the teleological interpretation of this Principle which are discussed below. Therefore, this word is widely taken to carry a general meaning so as to include also '*claims*' that are referred to arbitration from the beginning (and also other methods of dispute settlement). In addition, there is another legal issue to be considered that suggests that arbitration, as a dispute settlement method in the WTO dispute settlement system, falls under the constitutional Principle even if a narrow interpretation is employed. Here the argument is that the WTO dispute settlement system is defined as a 'quasi-judicial'⁴⁹ system.⁵⁰ It should be taken into consideration that by the word 'quasi-judicial' it is not meant that the WTO DSS is merely an arbitration system. The DSS includes several dispute mechanisms, including arbitration, and therefore it is not only restricted to judicial proceedings. This means that 'claims' in this dispute

⁴⁵ Principle 165 states: 'Trials are held openly and the presence of the public is not banned, unless the court determines that their openness contradicts public chastity or public order; or if, in private disputes (claims), the parties involved request that the court not be open.'

⁴⁶ Principle 167 states: 'The judge must try to base the verdict of each dispute (claim) on the codified laws. If his attempt fails, he should issue the verdict on the case by referring to reputable Islamic sources or religious rulings (fatwas). He cannot refrain from issuing a verdict under the pretext of silence, deficiency, brevity, or inconsistency in the laws.'

⁴⁷ It bears mentioning that the term 'claim' in translation to English from Farsi is replaced by other English terms.

⁴⁸ Shahbazi-Nia (2007), pp. 247-255.

⁴⁹ See chapter two, section 2.3.7. (Quasi-judicial).

⁵⁰ P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2008), p. 118.

settlement system with regard to Iran, under both the general and the specific interpretations of the word *claims*, fall under this Principle. This issue is discussed further below.

II. What is meant by the apparent link between the terms ‘claims’ and ‘referral to arbitration’ in Principle 139 of Iran’s Constitution? Does it extend only to ‘referral to arbitration’ in the context of a dispute? It can be also argued whether the discussed constitutional requirements are restricted to disputes and not contracts containing dispute settlement provisions. Accordingly, it can be asserted that, when there is no dispute, no parliamentary approval is needed.

As discussed below, it can be argued that, if a contract or a treaty is concluded which contains a dispute settlement mechanism, its parties cannot avoid participation in dispute settlement proceedings by invoking domestic restrictions, unless those domestic restrictions have been agreed upon between the parties during the negotiations of that contract. In the alternative, in case of a dispute, the other party to the dispute can also show its satisfaction with regard to the relevant domestic restrictions. As is also discussed below, the practice of Iran with regard to Principle 139 is inconsistent with this argument which restricts the *‘claims’* to raised disputes. In other words, it is argued that, if there is no dispute between the parties to a contract, this contract is still not under the scope of the Principle 139 requirements. Therefore, it should not be sent to the Parliament, even though it includes dispute settlement clauses.

Iran’s Parliament practice in relation to accession to multilateral and bilateral agreements reveals that state or public-owned contracts containing dispute settlement clauses⁵¹ should also be adopted by Parliament. This practice also proves that, under the Parliament’s interpretation of the mentioned Principle, Iran’s constitutional requirements on state and public property disputes are not restricted to raised disputes.

⁵¹ Under this practice, an authorization is also required when the dispute settlement clauses do not provide for compulsory jurisdiction. For further details, see chapter four, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

III. It is also claimed⁵² that a '*referral to arbitration*', which is stated in Principle 139 of Iran's Constitution, refers to a '*referral*' that is initiated by an Iranian party and not by a foreign party to a dispute. The proponents of this argument assert that, under the terms of Principle 139 of Iran's Constitution, when a non-Iranian party to a dispute refers a dispute to arbitration, the Iranian party – subject to the arbitration clause – is obliged to accept the arbitration. It cannot hide behind its domestic restrictions if it has ratified a contract or treaty from which the dispute arises.⁵³ Based on this interpretation, if Iran, for instance in the WTO dispute settlement system, would be a responding party, it does not need to get an approval of its Parliament. Yet as a claimant it would have to. Since in the later situation Iranian constitutional law could only work to restrict Iranian prerogatives, this might be a restriction that other WTO Members would be able to tolerate. It bears mentioning that only Iran's Government could be a complainant in a WTO dispute settlement. Therefore, this would mean that the Government would have to ask the Parliament's permission to bring a dispute to the WTO dispute settlement system. Indeed, no other WTO Member would object to such a requirement. However, I very much doubt that this is what Principle 139 is intended to achieve.

Considering the purpose of such a restriction in Iran's Constitution (teleological interpretation of the Principle), however, one cannot find any differentiation in the Constitution nor in Iran's legal system at large that would differentiate between the two mentioned positions in a dispute. Being a respondent, the Iranian Government can send the referral request to its Parliament to be accepted or rejected. Yet the approval or disapproval of a referral by the Parliament cannot affect the compulsory participation of Iran in a dispute⁵⁴ under WTO law. However, the disapproval would mean that Iran's Government shall not participate in such a case and, if it does participate, the result of a dispute settlement regarding that case would not be

⁵² M.B. Feejan, "A Brief Review on Arbitration Agreements [مختصری راجع به موافقتنامه]" 2011, available at <http://www.samavatipour.com/?p=554>, last visited on 1-10-2016.

⁵³ For more information see: id.

⁵⁴ For example, in the WTO dispute settlement system, if a WTO Member requests another Member for 'Consultations', the responding party 'shall' respond to this request (See Article 4.3 of the DSU).

accepted by the Iranian domestic legal system. Consequently, the term '*referral to arbitration*' should be considered as a requirement based on Iran's constitutional rules which state that Parliament's approval should be obtained both when Iran acts as a claimant and when it is a respondent in a dispute. This issue will be analyzed further below.

IV. The main criteria to determine whether an issue should be sent to Iran's Parliament or not is to establish whether it is relevant to '*public and state property*'. Therefore, one needs to first establish the meaning and scope of these terms. Understandably, Principle 139 of the Constitution does not define the meaning of these terms. Since such terms can vary from one legal system to another, a close examination of the meaning of these terms in the Iranian context – which is the only context that matters here – is in order. For a contextual interpretation, one can turn to other principles of Iran's Constitution, including Principle 44 which states:

The economic system of the Islamic Republic of Iran is based on three sectors: state, cooperative, and private, and will be based on disciplined and correct planning.

The state sector includes all the national industries, foreign trade, major mines, banking, insurance, energy sources, dams and large water irrigation networks, radio and television, post, telegraph and telephone, aviation, navigation, roads, railroads, and others which are publicly owned and under the state's control.

The cooperative sector will include corporations and cooperative institutions of production and distribution that are established in accordance with Islamic criteria in cities and villages.

The private sector is comprised of that sector of agriculture, animal husbandry, industry, trade, and services that complement the state and cooperative economic activities.

The law of the Islamic Republic protects ownership in these three sectors as long as it agrees with the other principles described in this chapter; and it must not surpass the limits set by Islamic law. Such ownership must induce development and growth in the country's

economy; and not cause any social harm. The details of the regulations, areas, and boundaries of the three sectors will be determined by law.⁵⁵

As can be observed from the above quote, under the wording of this Principle, the scope of 'state' property is very wide and appears to include many kinds of properties, such as all the national industries, foreign trade, major mines, banking, insurance, energy sources, dams and large water irrigation networks. That is why some years ago a new and different interpretation of this Principle was issued in long-term strategy papers⁵⁶ which were adopted by Iran's National Expediency Council.⁵⁷ This new interpretation later took the form of laws approved by the Parliament. Under this strategy, the Government is required to transfer any kind of activity that is not covered by Principle 44 to the cooperative, private, or public non-governmental sectors.⁵⁸ A detailed discussion is beyond the limited scope of this chapter.⁵⁹ There is at least one other Principle in Iran's Constitution which can be used to establish a contextual interpretation of the meaning of 'public property'. Principle 45 of the Constitution reads as follows:

The following are under the control of the Islamic government: wastelands and public wealth, abandoned or unclaimed land of deceased owners, mines, seas, lakes, rivers, and other public bodies of water, mountains, valleys, forests, marshlands, natural prairies, unrestricted pastures, inheritance without any heir, wealth without any identified owner, and public wealth that is confiscated from the usurpers. The Islamic government will treat these in accordance with

⁵⁵ Principle 44 of the Constitution of the Islamic Republic of Iran.

⁵⁶ The long-term strategies are called: 'General Policies pertaining to Principle 44 of Iran's Constitution'.

⁵⁷ The "National Expediency Council" is an Iranian constitutional institution whose main task is to resolve disputes between the Parliament and the Guardian Council. For a detailed discussion on this Council see section 3.5.5. National Expediency Council).

⁵⁸ Article A (1) of General Policies pertaining to Principle 44 of Iran's Constitution, for the full text see:

<https://www.princeton.edu/irandataportal/laws/labor-civilsociety/principle-44-policies>, last visited on 01-05-2013, last visited on 1-10-2016.

⁵⁹ For further information see chapter three, section 3.5.5. (on powers and duties of the National Expediency Council).

the public interest. The law shall determine the detail and manner of utilization of each of them.⁶⁰

It is worth mentioning that the Principle 139 of Iran's Constitution cannot be clarified unless the other relevant factors are considered. Other relevant factors are the domestic legislation and the practice of Iran's legal and economic system with regard to this Principle.

To clarify the difference between the '*public*' and '*state*' property briefly on the basis of Principles 45 and 46 of Iran's Constitution, it can be described as follows: a '*public property*' means a property which belongs to the people but is under government's control, as in rivers, mountains, forests etc. And a '*state property*' means a property which belongs to the government and is also under its control, such as a governmental bank. Accordingly, this would suggest a clear scope of '*public and state property*' to determine which case is required to be sent to the Parliament before its referral to arbitration and other dispute settlement mechanisms and which is not. More importantly, this clarification is almost undisputable since it is based on the wording of other principles of Iran's Constitution.

A very important question which can be raised here is when does a WTO dispute concern '*public*' or '*state property*'?

To answer this question, first it should be considered that in some developing countries, like Iran, most infrastructure industries – such as the industries which are stated in Principle 44 as the state sector – belong to the Government. Therefore, state-owned companies control the majority of goods or service industries. In Iran, for example, most transport, insurance or banking industries are either owned or controlled by the Government. In a number of developing countries, the economic system is very dependent on the government and private sectors do not play an important role in the trade of goods and service, at least in the infrastructure industries. Hence, a huge share of imports and exports in Iran are directly or indirectly owned by the

⁶⁰ Principle 45 of the Constitution of the Islamic Republic of Iran.

Government⁶¹ and therefore, Iran's disputes in high scale trade fields can involve with the requirement of Principle 139 of Iran Constitution.

Secondly, some years ago, two bilateral agreements between Iran and the Russian Federation⁶² and Azerbaijan,⁶³ which were signed and then adopted by Iran's Government and Parliament, were rejected by the Guardian Council.⁶⁴ Iran's Guardian Council rejected those agreements because, as it stated in its opinions, the agreements 'can' be in conflict with the Constitution.

Even if in the vast majority of cases there will be no conflict, a small number of agreements will directly or indirectly result in a conflict with the Constitution. This can therefore lead to the annulment of the agreement between the parties, even though there are some solutions under Iran's Constitution to save the agreement, such as the adoption of the agreement by the National Expediency Council. As a result, even if most of the trade in goods and services in Iran had been owned by the private sectors, any conflict

⁶¹ According to 'The World Factbook': 'Iran's economy is marked by statist policies, inefficiencies, and reliance on oil and gas exports, but Iran also possesses significant agricultural, industrial, and service sectors. The Iranian government directly owns and operates hundreds of state-owned enterprises and indirectly controls many companies affiliated with the country's security forces. Distortions - including inflation, price controls, subsidies, and a banking system holding billions of dollars of non-performing loans - weigh down the economy, undermining the potential for private-sector-led growth. Private sector activity includes small-scale workshops, farming, some manufacturing, and services, in addition to medium-scale construction, cement production, mining, and metalworking.' For further information see: <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>, last visited on 1-10-2016.

⁶² Guardian Council's Opinion no. 78/21/5034 (21 July 1999) regarding the Bilateral Agreement on Judicial Assistance between Iran and Russian Federation, see Islamic Parliament Research Centre website.

⁶³ Guardian Council's Opinion no. 78/21/4582 (3 May 1999) regarding the Bilateral Agreement on Judicial Assistance between Iran and Azerbaijan, see Islamic Parliament Research Centre website.

⁶⁴ The Guardian Council is a constitutional institution which checks the constitutionality of the Parliamentary approvals. For further information see chapter three, section 3.5.4.2. (Guardian Council).

regarding the remainder⁶⁵ should have been referred to the WTO dispute settlement system or other dispute settlement systems outside Iran. Those cases shall be sent to Iran's Parliament due to being state or public properties. Disputes between Iran and a foreign party can involve state or public properties and, therefore, to resolve them in the WTO dispute settlement system, the requirements of Principle 139 of Iran's Constitution should be complied with.

Last but by no means least, the Principle employs the word '*assembly*'. What is referred to by the term '*assembly*' is not ambiguous. It refers to the Islamic Parliament of Iran. The legal question that arises is whether or not it is possible to send the request for arbitration to a higher assembly which is described in Principles 110 and 112 of the Constitution. In other words, it is arguable whether the 'National Expediency Council', under section 8 of Principle 110 or Principle 112 of the Constitution, can make binding laws which are regarded as having a higher ranking position than the Parliamentary laws. Therefore, it can be argued that if the National Expediency Council⁶⁶ is an assembly with a higher position than the Parliament, which is equally competent to draft laws, the Government can send the request for arbitration to the Council rather than the Parliament in order to comply with the requirements under Principle 139.

This may seem surprising to law experts that are not familiar with Iran's legal system, as the difference is not clear for them. Hence, it should be noticed that getting an approval of the Parliament sometimes can take years while, under some conditions, the same issue can be resolved in the National Expediency Council in a shorter period of time.

⁶⁵ The private sectors do not have direct access to the WTO DSS. However, they usually induce the government to take their dispute to the DSS. See chapter two, section 2.3.3. (Access to the DSS).

⁶⁶ When a parliamentary approval is sent back to the Parliament by the Guardian Council because of being inconsistent with the Constitution, the Parliament can send it to the National Expediency Council to be examined and adopted there. The NEC decides on the basis of national interest. For further information see the relevant sections in chapter 3, section 3.6.4. (National Expediency Council's Role) and chapter 4, section 4.3.5. (The Role of the National Expediency Council in the Accession Process).

It can be asserted that, due to the practice of the National Expediency Council⁶⁷, its position as a special assembly with clear powers and duties is well recognized by Iran's Constitution and also by law experts. Therefore, not everything can be sent to this higher assembly, otherwise the normal national assembly, which is composed of the direct representatives of the people, would be useless. In other words, cases can be sent to the National Expediency Council which are not resolved by the Parliament. Therefore, under Iran's Constitution, only issues which are within the scope the National Expediency Council's jurisdiction can be examined and resolved there.

It bears mentioning that, considering the wording of Principle 110 of the Constitution, it appears that the request for arbitration (or other dispute settlement mechanisms) should not be initially sent to the National Expediency Council, if it could also be sent to the Parliament. Section 8 of Principle 110 of the Constitution severely restricts the situations in which issues can be sent to the National Expediency Council to '*issues in the system which cannot be resolved by ordinary means*'.⁶⁸ Accordingly, sending the request for arbitration (or other methods of dispute settlement) to the National Expediency Council is possible if other constitutional methods do not work. For instance, if the request for arbitration is sent to the Parliament but there is no response after a long period of time, then it is assumed that, in these circumstances, it may be expedient to think about how to use the possibilities offered by other constitutional organs such as the National Expediency Council.

To conclude, as discussed above, the examination of Principle 139 from the view of the literal interpretation indicates that the legal conflict between the requirements of Principle 139 and the WTO DSU exists and cannot be removed through the above-mentioned interpretation.

⁶⁷ Iran's National Expediency Council is a council which can resolve the disputes between the Parliament and the Guardian Council when the Parliament's approval is sent back to the Parliament because it contains an inconsistency with Iran's constitution. This Council also has other tasks which are discussed in chapter 3, section 3.5.5. (National Expediency Council).

⁶⁸ Section 8 of Principle 110 of Iran's Constitution.

5.3.2. Historical Interpretation

To have a better understanding of Principle 139 of Iran's Constitution, one can also revert to a historical interpretation of this provision. For this an examination of the historical background of the negotiations and codification of this Principle is necessary. Iran experienced a revolution in 1979 and changed from a monarchy to a republic. *'Through the affirmative vote of a majority of 98.2% of eligible voters'*⁶⁹ the Islamic republic was formed in the same year. The draft of a new Constitution, which was discussed in the Assembly of Experts for Constitution,⁷⁰ was also approved by the people through a referendum held on 24 October 1979.⁷¹

Although Iran has never been a colony, the country's natural resources were exploited by foreigners. This is attributable to the weak governments in those times. The Constitution aims to prevent such exploitation and it thus contains many stipulations that mandate caution in dealing with foreigners whenever national interests are concerned. The Constitution provides for different levels of supervision. These levels include deeds and decisions from the Leader⁷² to assemblies, councils, etc. Considering the codification of discussions of the Assembly of Experts for Constitution, they clearly demonstrate that the aforementioned concerns are reflected in the constitutional Principles such as in Principle 139. The Members of the Assembly did their best to avoid any abuse of *'state and public property'* by strengthening this Principle with the customary control mechanisms, such as the requirements stated in Principle 139 that used to be a prevalent control mechanism on international arbitrations. The record of the negotiations shows that there were more stringent suggestions extending even to the banning of any kind of referral to arbitration beyond the borders of the

⁶⁹ Principle 1 of the Constitution of Iran.

⁷⁰ Assembly of Experts for Constitution was an assembly whose 75 Members were directly appointed through the people's vote. On 19 August 1979 this assembly started its work on codification of the Constitution. After three months, on 15 November 1979 the draft of the Constitution was ready to be adopted through the referendum by the people, see the web site of the Islamic Revolution Documents Centre at: <http://www.irdc.ir/fa/calendar/42/default.aspx>, last visited on 1-10-2016.

⁷¹ See chapter 3, section 3.3.2. (Islamic Revolution and the 1979 Constitution).

⁷² See chapter 3, section 3.5.1 (The Leader Under Iran's Constitution).

country. To give an idea of the nature of the drafters' concerns, an excerpt of the discussion on the draft of the Principle 139 is presented:

Imagine you buy one hundred Phantom airplanes from the United States of America. Then a dispute happens which amounts to billions of Tomans⁷³. What if the Board of Ministers examines the dispute and decides to declare that we are neither creditor nor debtor, and (consequently) it just informs the Parliament about it and then the issue is finished!⁷⁴

It seems that the public properties are very important and giving its full control to the Government would be very dangerous... In principle, these issues should be based on the Parliament's decision.⁷⁵

This shows that the Assembly intended to create requirements to strengthen parliamentary supervision over resolving state and public property disputes.⁷⁶ These requirements were made in order that Members of the Parliament, as the representatives of people, are adequately informed of any issues concerning people's properties. This clarification on state and public property can result in a decision by the Parliament to accept or reject a referral of a relevant dispute to a dispute settlement system.

It bears mentioning that the drafters of the Constitution also deliberated upon some radical suggestions, such as forbidding any kind of referral of public and state property issues to arbitration, except for domestic arbitrations.

I believe that here, the issue of arbitration should be clarified. In transactions with foreigners, referral should be (only) to domestic arbitration, and international arbitration should be banned because it

⁷³ Toman is a part of Iran's currency and almost three thousand Toman equals a Dollar.

⁷⁴ Ayat, Assembly of Experts (1985), p. 1308, (Translation S.A).

⁷⁵ Ibid, Golzaade Ghafouri, (Translation S.A).

⁷⁶ Under Iran's constitutional system, there are five supervisory tasks for the Parliament: establishing supervision; political supervision; financial supervision, informative supervision and approbation supervision. See chapter 3, section 3.5.4.1. (Parliament).

can make some problems, as in the past we had some problems on the basis of the same issue.⁷⁷

Nevertheless, as mentioned before, these radical suggestions were rejected by other Members of the Assembly due to their inconsistency with the current state of international trade and investment law and the impediments that such suggestions could impose upon the country, its Government and the Iranian natural and legal entities.

Therefore, what was approved was based on the lowest level of concerns stated in the Assembly in that time.

To conclude, it was discussed that taking the requirements of Principle 139 into consideration from a literal interpretation shows that there is a legal conflict between Principle 139 and the WTO DSU which cannot be removed via the discussed interpretation.

5.3.3. Authentic Interpretation

Ambiguities of legal rules usually can be noticed when, in practice, there is a debate on enforcement and, for instance, the scope of a particular law. As regards the Constitution, ambiguities may lead to some serious disputes in the government of a country. These kinds of issues are usually inevitable, but there must be a competent authority to resolve disputes by clarifying the controversial provision. This power is recognized in all legal systems and can usually be performed by a high level authority in the form of a supreme court or a constitutional court. In Iran, this power is assigned to the Guardian Council,⁷⁸ which performs similar functions to those of constitutional court does in other constitutional systems. Therefore, to remove the ambiguities of the principles in Iran's Constitution, the Guardian Council is recognized as the competent authority for interpretation under the Principle 98 of the Constitution.⁷⁹

⁷⁷ Ibid, Daanesh raad, p. 1307, (Translation S.A).

⁷⁸ See chapter 3, section 3.5.4.2. (Guardian Council).

⁷⁹ It bears mentioning that the National Expediency Council can resolve the disputes between the Guardian Council and the Parliament. However, it cannot issue interpretations on the Constitution. See chapter 3, section 3.6.4.2. (Important Questions on the National Expediency Council).

The interpretation of the Constitution is the responsibility of the Guardian Council. This is determined with the approval of three-fourths of its Members.⁸⁰

To approve an interpretation, a quorum of nine Members of the Guardian Council is necessary.⁸¹ The Guardian Council has several tasks prescribed in the Principles of the Constitution.⁸² According to Article 18 of the Internal Regulation (Guardian Council's Rule of Procedure)⁸³, an interpretation can only be requested by a limited number of authorities enjoying such high positions as the Head of the Parliament or the Head of the Judiciary.^{84,85} So far, a few requests for an interpretation of Principle 139 have been received by the Guardian Council and several interpretations have been issued, among which three opinions are discussed below.⁸⁶

On 17 November 1983 the first of the relevant interpretations, was requested by the Parliament's Chairman and relates to the scope of a Parliaments' approval on international or bilateral treaties and transactions.⁸⁷ The question was about when a contract is approved by the Parliament and then the parties to that contract agree to change a small part of it, for instance, changing an amount of money stated in the contract, will the Iranian party need to send it once again to the Parliament after getting the Government's approval?

⁸⁰ Principle 98 of the Constitution of the Islamic Republic of Iran.

⁸¹ Under Article 15 of the Guardian Council's Internal Regulation there shall be nine members available for interpretation discussions, but to vote all members are requested to participate due to this requirement in Principle 89 that a qualified majority of three-fourths of members' vote is necessary for an interpretation.

⁸² Principles 4, 69, 93, 94, 97, 98, 99, 111, 112, 121 and 117 of Iran's Constitution include rules on supervising elections, consistency of the Parliaments' approvals with the Constitution, etc. See chapter 3, section 3.5.4.2. (Guardian Council).

⁸³ [آیین نامه داخلی شورای نگهبان], (Translation S.A).

⁸⁴ Interpretations No. 993 dated 29-11-1983, No. 3786 dated 9-07-1985, No. 7484 dated 01-01-1987. For further information see the Guardian Council's website.

⁸⁵ The Head of the Judiciary is the head of the courts in Iran who is appointed by the Leader for five years. For further information on the Head of the Judiciary see chapter 3, section 3.5.6. (Judiciary).

⁸⁶ For more information see the website of the Guardian Council.

⁸⁷ This interpretation is more relevant to Principle 77, but the result could also be used for Principle 139 of Iran's Constitution. Principle 77 states that 'Treaties, transactions, contracts, and all international agreements must be ratified by the Islamic Consultative Assembly.'

The Guardian Council responded that the Government's activities (regarding dispute settlement for contracts) are valid just within the framework of what is approved by the Parliament.⁸⁸ It can be argued that, if an issue with a certain amount of value is accepted to be 'referred' to arbitration, then can it be inferred that other negotiations and agreements within the scope of that 'referral' do not need a new approval of the Parliament. For example, if referral of an issue to the WTO dispute settlement system is accepted by the Parliament, is it necessary to ask for a new admission on referral to, for instance, arbitration on the level of suspension of concessions?⁸⁹

To answer to this question, it bears considering that there is a principle in Iran's legal system which states: 'an authorization for something is also an authorization for its accessories.'⁹⁰ This principle is the basis for several laws such as Articles 104, 577, 671 of Iran's Civil Code, among which Article 671 states:

An agency for a certain matter involves an agency for the preliminaries and essential preparations for that matter, unless it be expressly stated that the agency does not apply to them.⁹¹

It can be concluded from this principle – which originates from Islamic law⁹² – that, if under Principle 139 of the Constitution the Parliament authorizes the referral of a dispute to arbitration, such as the one under the DSS, this authorization should also include a referral to other relevant dispute settlement mechanisms in that system. Therefore, the above-mentioned

⁸⁸ Interpretation No. 9993, dated 29-11-1983, the Guardian Council's website.

⁸⁹ Article 22:6 of the WTO Dispute Settlement Understanding. That is the same for other arbitrations such as arbitration of article 21.3(c) or arbitration of article 25 and also other methods of dispute settlement under the WTO dispute settlement system.

⁹⁰ This Principle in Farsi is: [ان در شی این در لوازم آن نیز می باشد], (Translation S.A). It bears mentioning that this principle was originally taken from Islamic law. Under Principle 4 of Iran's Constitution all Iran's law and regulations shall be consistent with Islamic principles. This rule shall be taken into consideration by the Guardian Council when interpreting the Constitution.

⁹¹ Article 671 of Iran's Civil Code. (Translation WIPO: <http://www.wipo.int/wipolex/en/profile.jsp?code=IR>).

⁹² It is stated in Islamic law books such as: A.S.R. Khomeini, *Tahrir Al Vasileh* [تحریر الوسیله], trans. S.M.B. Mousavi Hamdedani, vol. 4 (Darol Elm, 2008), Question 2, p. 621.

interpretation does not require a separate authorization for each phase of dispute settlement if a referral is authorized.

The second relevant interpretation (31 December 1986) was about whether Principle 139 includes taking a dispute to a judicial system with regard to public and state properties or if it just includes referral to arbitration?

The Guardian Council's response to this question is: taking a claim (dispute) with regard to public and state property to (international) court does not fall within the scope of Principle 139.⁹³ It is also stated in this interpretation that Principle 139 is '*solely relevant to the settlement of claims relating to public and state property or its referral to arbitration*'.⁹⁴

If this interpretation is what the Assembly of Experts for the Constitution meant by Principle 139 then what should be the meaning of the word 'or' after the terms '*settlement of claims*' in this provision?⁹⁵ In other words, according to this interpretation of the Guardian Council there must be an '*and*' rather than an '*or*', otherwise the '*settlement of claims*' would mean something different from the '*referral to arbitration*'. If so, what is the meaning of the '*settlement of claims*' if the interpretation says that it does not include taking disputes to courts?

Regarding the point raised, one can refer to the general meaning of the term '*settlement of claims*'. If '*settlement*'⁹⁶ should mean something other than taking a lawsuit to a court, then it can refer to all methods of settlement of a dispute. Nevertheless, on the basis of the Guardian Council's interpretation, the terms '*settlement of disputes*' and '*referral to arbitration*' used in Principle 139 of Iran's

⁹³ Interpretation No. 7484 dated 01-01-1987, *ibid*.

⁹⁴ *Ibid*, (Translation S.A).

⁹⁵ Iran's Constitution Principle 139: 'The settlement, of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Board of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here.'

⁹⁶ According to the most known Persian encyclopedia: '*Dehkhoda*' [دِهْخُودَا], the term '*Solli*' (in Farsi) means settlement or conciliation of dispute between two parties. (Translation S.A), Dehkhoda, Ali Akbar, "*Dehkhoda Encyclopedia* [دِهْخُودَا]," (Tehran University Press, 1958).

Constitution do not include taking an issue to court,⁹⁷ even though I do not understand the legal basis of this restrictive interpretation of the Council and respectfully I disagree with this interpretation.⁹⁸ To conclude, according to this interpretation, if the WTO dispute settlement system had been judicial, Iran would not have needed to implement the requirements stated in Principle 139 of its Constitution to resolve a dispute in this system.

However, the dispute settlement system of the World Trade Organization is not judicial. It is a hybrid system – including various methods of dispute settlement such as consultations, arbitration, good offices, conciliation and mediation – and is considered a ‘quasi-judicial’⁹⁹ dispute settlement system. Ehlermann, a former Appellate Body Member of the World Trade Organization¹⁰⁰ believes that:

Dispute settlement in the WTO is not a process that is entrusted entirely to an independent- judicial branch. It would be wrong to qualify it as a purely judicial process. It is a quasi-judicial mechanism. It is a hybrid. And it will remain so far the foreseeable future.¹⁰¹

⁹⁷ As far as it can be understood from the circumstances governing the raised question and the issued interpretation thereafter and also the discussions on drafting and approving Principle 139, taking a dispute to a national court out of Iran’s territory is excluded from the scope of that interpretation and, hence, it can be argued that as international courts such as *International Court of Justice* are, to some extent, different from a domestic court, the interpretation issued by the ‘Guardian Council’ did not exclude the international disputes systems.

⁹⁸ As it is mentioned in chapter 3, section 3.6.4.1 (How the Council Deals with International Agreements such as the WTO Agreements), the Guardian Council rejected the Parliament’s approval on the bilateral Agreement on Extradition of Criminals between Islamic Republic of Iran and the Republic of India. This Agreement was rejected because, as it was stated by the Guardian Council, the Indian courts and judgments which are not based on Islamic rules cannot be recognized in Iran. Therefore, on the basis of this view of the Guardian Council, it is difficult to see how multilateral courts such as the WTO dispute settlement system would be recognized in Iran’s legal system.

⁹⁹ Van den Bossche (2008), p. 118.

¹⁰⁰ Claus-Dieter Ehlermann of Germany served on the Appellate Body from 1995 to 2001. He was born in 1931, and is an internationally-recognized authority on international economic law (www.wto.org).

¹⁰¹ C.D. Ehlermann, "Experiences from the Appellate Body", *Texas International Law Journal* (2003) 38, pp. 469-470.

Accordingly, either in taking or responding to disputes in the WTO quasi-judicial dispute settlement system, Principle 139 of Iran's Constitution will still be binding upon Iran and therefore, the constitutional requirement of Parliament's approval is unavoidable. As Van den Bossche has also stated,¹⁰² the WTO dispute settlement system is neither merely judicial, nor merely arbitration. It is a quasi-judicial system.¹⁰³ Therefore, if it is not judicial, it is not excluded from the scope of requirements of Principle 139 of Iran's Constitution.

Furthermore, even if the WTO dispute settlement system was to be qualified as purely judicial, there are several forms of arbitration, mutually accepted solutions and other non-judicial methods in this system, which cannot be excluded from the scope of Principle 139.

It bears considering that in a few cases the Guardian Council has returned some international agreements to the Parliament which included referral to judicial systems, such as the International Court of Justice, because of being inconsistent with Principle 139 of the Constitution. Therefore, it can be concluded that the referral of state and public disputes to international (but not national) judicial dispute settlement systems also requires authorization by the Parliament. For further information see chapter four.¹⁰⁴

And last but not least, the third request for interpretation¹⁰⁵ that was referred to the Guardian Council which is to be examined here concerned the question whether a contract or treaty, which had not been sent to the Parliament at the time of its conclusion because it was regarded as not being under cover of the Principle 77 of the Constitution,¹⁰⁶ should be sent to the Parliament if the settlement of dispute or referral to arbitration is needed.

The Guardian Council responded that:

¹⁰² Van den Bossche and Zdouc (2013), p. 118.

¹⁰³ For further discussion see chapter 2, section 2.3.7. (Quasi-judicial).

¹⁰⁴ See chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

¹⁰⁵ Guardian Council Interpretation No. 3786 dated 9-07-1985, for further information see the Guardian Council's website.

¹⁰⁶ Principle 77 of Iran's Constitution says that international contracts shall be approved by Iran's Parliament.

Principle 139 of the Constitution explicitly states that the settlement of disputes relating to public and state property where one party to the dispute is a foreigner in addition to the approval of the Board of Ministers shall be approved by the Parliament and there is no exception included in this Principle...settlement of claims does not relate to the approving a contract.¹⁰⁷

Based on this interpretation, there might be contracts between Iranian natural or legal entities and foreigners that, for whatever reason, can be excluded from the requirement of Principle 77 of Iran's Constitution to be approved by the Parliament. However, when a dispute is raised, if Iranian public or state properties are involved, Principle 139 will be undoubtedly at issue too.

To examine whether the requirements stated by Principle 139 of Iran's Constitution are implemented, and to know Iran's practice concerning its participations in disputes, the systemic interpretation of the Principle must be considered, which is discussed in detail the subsequent chapter.

To conclude, an authentic interpretation view based on an examination of Principle 139 indicates that, due to the quasi-judicial nature of the WTO DSS mechanisms, the legal conflict between Principle 139 and the DSU exists and it cannot be removed through interpretations issued by the Guardian Council.

5.3.4. Systemic Interpretation

Another method of legal interpretation that can be used to analyze the exact meaning and legal effect of a legislation is the so-called systemic interpretation. This method is used here to find out whether the requirements of Principle 139 of the Constitution are practically and efficiently recognized by the constitutional authorities and bodies of a country. Given the many rules embodied in constitutions, it is difficult to claim that all are being fully observed and implemented in the respective fields of the domestic legal systems. Even in Iran's Constitution, there are some principles which are regarded as just being symbolic/decorative. To implement all rules contained in a constitution, a country needs a high-level of capacity, not only in law, but

¹⁰⁷ Guardian Council Interpretation No. 3786 dated 9-07-1985, *ibid.* (Translation S.A).

in all required fields, such as economics, politics, culture, etc. Furthermore, it cannot be argued that all rules in a constitution are fully feasible and can lead to positive consequences in a country. It is undeniable that both the world and society are changing and making all constitutional rules compatible with our daily lives is not an easy task.

Some authors may suggest that the requirements, such as those embodied in Principle 139 of Iran's Constitution, need to change to be fully compatible with the so-called international arbitration practice. However, it is one thing to argue that existing provisions should be amended and it is something else not to apply them because they are considered in need of change. This was also part of the argument that might have resulted when possible changes in constitutions (or other high-ranking laws) of developing countries¹⁰⁸ in joining the WTO. Nevertheless, this price may be considered to be too high for accession to an organization and even unnecessary for a country like Iran.

To establish the practical implementation of Principle 139, one needs to examine the governmental and parliamentary rules enforcing the requirements of this Principle. These rules can be addressed, as the practical interpretations of Principle 139 show the current 'legal order' of the Iranian system on the settlement of state and public disputes.

The practical interpretation of Principle 139 is discussed in detail in the subsequent chapter.

5.3.5. Teleological Interpretation

As discussed above, there are different interpretations of Principle 139 of the Constitution. For instance, the view of Iran's Government is sometimes

¹⁰⁸ For instance, in the accession process of China to the WTO, China was asked to amend its laws and rules which were inconsistent with WTO law. This is also mentioned in the protocol of China's accession to the WTO. Section 2(A)(2) states: 'China's local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol.', WTO document WT/L/432, 23 November 2001, p.3. For instance, to join the WTO, China amended its intellectual property laws. However, in practice intellectual property protection in China is different from what is required by the relevant international standards. See the TRIPS disputes taken by WTO Members to the WTO DSS against China.

different from the Parliament's view. For instance, their views regarding the case-by-case approval method, which is to request the Parliament to decide in every case, differ. The wording of Principle 139 of Iran's Constitution states that the settlement of claims relating to public and state property or the referral thereof to arbitration is '*in each case*' dependent on the approval of the Board of Ministers and the Parliament.¹⁰⁹ This wording is consistent with a case-by-case approval approach which has been implemented by the Parliament. Nevertheless, the Government has accomplished a *blanco* approval approach with regard to the referral of state and public disputes to arbitration. This Government's approach was criticized by the Parliament through a formal report on the results of the 'Iran-United States Claims Tribunal Process' which was officially submitted to the Parliament on 20 May 2008 and it has been sent to the Judiciary¹¹⁰ as a claim against the Government. This is discussed in more detail in chapter six, section 6.3.2.1. (The Iran-United States Claims Tribunal and Principle 139).

Pursuant to Principle 98 of Iran's Constitution, the Guardian Council is the only competent authority to formally interpret the Constitution. In doing so, there should be some criteria upon which to base an authentic clarification and interpretation by the Council. However, it should be taken into consideration that looking at the 'purpose' of the text would not decide all interpretative questions. In addition to the reading the text in its context and in the light of its object and purpose, one reliable source where the aforementioned criteria can be found is the 'purposes' stated in the codification of the Assembly of Expert for Constitution. These purposes were expressed by the Members of the Assembly in the codification of Principle 139 and are mostly focused on 'clarification' of the peoples' benefits before the referral of a dispute to settlement mechanisms through their representatives in the Parliament. There are enough enforcement mechanisms provided by the Constitution to avoid any sort of abuse with regard to the 'public and state properties'. Some of these purposes are as follows:¹¹¹

- To allow for more accuracy in dealing with a large amount of money;

¹⁰⁹ Principle 139 of Iran's Constitution.

¹¹⁰ The Judiciary is the court system of Iran. See chapter 3, section 3.5.6. (Judiciary).

¹¹¹ The purposes are taken from the negotiations of the 'Assembly of Expert for Constitution' on Principle 139 of Iran's Constitution, *ibid.* (Translation S.A).

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- To prevent any undue activities;
- To prevent any conspiracy between the *Board of Ministers* with a foreign party (in a dispute);
- To inform the people's representatives in the Parliament about the people's properties;
- To inform the people through raising those issues in the Parliament to get an approval. (Since the Parliament's negotiations are public and they will also be published in the Iranian Official Gazette, therefore, everybody has full access to the general information concerning the state and public property disputes with foreigners);
- To enable the Parliament to impeach the Government.

The main concerns of the Assembly of Experts for the Constitution, as can be noticed in the above-mentioned points, were to perform a parliamentary supervision¹¹² of international disputes. This includes is the duty of protecting the public properties (on behalf of the people) against any abuse, which may evolve into dealing with dispute settlement. That is to say, when a great deal of money is involved, corruption should not be underestimated. Effective surveillance can help to prevent corruption.¹¹³

Dispute settlement, which is the focus of Principle 139 of Iran's Constitution, is a part of an international transaction. Therefore, combating different aspects of corruption in these transactions, especially when a 'public official whether directly or through intermediaries'¹¹⁴ is involved 'in order to obtain or retain business or other improper advantage in the conduct of

¹¹² Under Iran's constitutional system, there are five supervisory tasks for the Parliament: establishing supervision; political supervision; financial supervision, informative supervision and approbation supervision. See chapter 3, section 3.5.4.1. (Parliament).

¹¹³ Corruption has been always a special concern for Iran with regard to concluding international contracts and resolving their disputes. For instance, see Iran's gas dispute with Sharjah's Crescent Petroleum, <http://www.thenational.ae/business/energy/irans-gas-dispute-with-sharjahs-crescent-petroleum-enmeshed-in-politics>, last visited on 1-10-2016.

¹¹⁴ Article 1 of *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. This Convention was adopted by OECD members in 1997 and entered to force on 15 February 1999. 34 OECD member countries and four non-member countries: Argentina, Brazil, Bulgaria, and South Africa, have adopted this Convention. For further information see OECD website: <http://www.oecd.org>, last visited on 1-10-2016.

international business'¹¹⁵ has always been an important concern in many countries. In Iran this concern has led to specific legislation to contain corruption. Regarding why some countries make restrictions to avoid corruption, Somarajah (2000) believes:

To a certain extent most of these restrictions are influenced by the old concept that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself. These restrictions are the expression of a deep rooted distrust of arbitration in countries which historically considered arbitration to be a dispute settlement favoring parties from industrialized countries.¹¹⁶

Such 'restrictions' are, however, also found in the domestic laws of some industrialized countries such as Germany,¹¹⁷ Belgium¹¹⁸ and France.¹¹⁹ It can thus be argued that the 'domestic restrictions' on the settlement of disputes, including referral to arbitration, have been founded on the basis of more reasonable objectives such as the prevention of abuse and corruption in international trade, which are still important issues in some OECD countries.¹²⁰

As regards the mentioned argument that the 'domestic restrictions' are rooted in a distrust between the developing and developed countries, it is also worth

¹¹⁵ Ibid.

¹¹⁶ M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000), p. 110.

¹¹⁷ Shahbazi-Nia (2007), p. 256.

¹¹⁸ In Belgium Article 1676(2) of the CJB contained a rule prohibiting legal entities of public law from concluding an arbitration agreement. See J.F. Poudret and S. Besson, *Comparative Law of International Arbitration*, Second ed. (Sweet & Maxwell, 2007), p. 184.

¹¹⁹ In France, Article 2060 of the Civil Code provides that there can be no arbitration... in disputes concerning public collectivities and public entities. In 1975 a new version of this Article was enacted (Art. 2060 (2)) which provides that some categories of public entities of an industrial and commercial character can be authorized to arbitrate by decree. See Poudret and Besson (2007), p. 183.

¹²⁰ In the Preamble of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions it is stated that: 'Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions'. For further information see OECD website. Ibid.

mentioning that there is a comparable discussion with regard to the use of the WTO dispute settlement system by developing and less developed Members. That is to say the traditional concerns of developing countries with regard to the settlement of disputes with developed countries can also be seen in the use of WTO dispute settlement system by the developing and less developed countries. In other words, in the past, there were some restrictions such as the one in Principle 139 which was made by the drafting Assembly in Iran- on the referral of disputes to international dispute settlement systems. Even though most restrictions have been removed now, the distrust has been demonstrated in a different way. There are a number of analyses made by WTO experts with regard to the weak participation of the low and lower income Members of the WTO. For instance, Shaffer (2006) has categorized the causes of this weak participation into three groups:

Although developing countries vary significantly in terms of trading profiles, they generally face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including the hiring of outside counsel; and (iii) fear of political and economic pressure. We can roughly categorize these as constraints of law, money and politics.¹²¹

We can conclude from the above passage that the restrictions made by some countries in the past were mostly on the basis of distrust and corruption concerns regarding international dispute settlement. This, from a teleological interpretation aspect, can also be the main reason that Iran's Assembly of Expert for Constitution adopted the requirements of Principle 139. As the mentioned concerns still exist regarding the settlement of Iran's state and public property disputes, it can be concluded that the legal conflict between Principle 139 and the WTO DSU cannot be removed through the discussed teleological interpretation.

¹²¹ G. Shaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation", *World Trade Review* (2006) 5, p. 177.

5.3.6. Doctrinal Interpretation

Principle 139 of Iran's Constitution has been discussed by Iranian law experts. Some views clarify the terms of the Principle. Others have given their own interpretation with regard to the scope. Also, some of the interpretations issued by the Guardian Council have been taken under consideration and were criticized. Their deficiencies have been analyzed by others and some suggestions are made to improve the enforcement of Principle 139.

What has been discussed under the doctrine relating to the wording of Principle 139 includes the terms which have important roles in the scope of the Principle. As different understandings of terms like '*dispute*', '*state and public properties*', '*referral to arbitration*', and '*approval*', which are stated in Principle 139, can lead to narrow or broad interpretations, they need to be clarified. This is why some controversies arose in this regard which gave rise to a doctrinal interpretation of this Principle.¹²² Some of these terms were already described above. Nevertheless, it is worth mentioning here that the two main determinants in the clarification of these terms by Iranian jurists are: i) purpose and ii) legal consequences of compliance with the Principle in international dispute settlement systems including the international arbitrations. A writer¹²³ who has focused more on the second factor, i.e. legal consequences in international scene, could not avoid a narrow doctrinal interpretation which is assumed to be in conflict with not only the first factor, i.e. the purpose, but also with the wording of the mentioned Principle. The proponents of a narrow interpretation of Principle 139 claim that, if we cannot implement the requirements of that Principle in some international arbitrations, we need to restrict the scope of these constitutional requirements to the extent that is consistent with international arbitration practice.

This argument does not take into account that the requirements of the Principle have been implemented in a number of disputes, even though some international arbitrators have been reluctant to recognize these kinds of

¹²² Shahbazi-Nia (2007), pp. 247-255.

¹²³ H. Mohebbi, "A Glance to Arbitration in Iran's Law [نگاهی به داوری در حقوق ایران]" 2010, available at <http://arbitration.ir>, last visited on 10-3-2017.

domestic law restrictions in issuing their arbitral awards. On supporting the narrow doctrinal interpretation, Mohebi, by referring to case law, states that:

Recently the case law¹²⁴ has recognized that the governmental companies and institutions which do not take action as government, are excluded from the scope of this Principle and for referral to arbitration they do not need to get the approval of the Board of Ministers or the Parliament.¹²⁵

This pragmatic view reflected in the quote is criticized by a majority of experts. For example, Shahbazi Nia says:

If the purpose of Principle 139 is to avoid abuse of public and state properties through settlement or referral to arbitration, then, trying to keep away from its inclusion is not only unaccepted from a logical and customary aspect, but also it is in conflict with the wording of this Principle.¹²⁶

Some jurists have criticized parts of the interpretations issued by the Guardian Council on Principle 139. For instance, the Guardian Council's interpretation, which excluded taking disputes of state and public property to (international) courts,¹²⁷ is debated and rejected by a number of experts.¹²⁸ For instance, Eskini says:

The interpretation (of Principle 139) issued by the Guardian Council which excluded taking disputes to court is arguable from the scope of the Principle. Similar to the referral to arbitration which shall be

¹²⁴ It is likely that the 'case law' mentioned here refers to some awards issued in a few international arbitrations. Some of those awards will be discussed in the subsequent chapter.

¹²⁵ Mohebbi (2010), (Translation S.A).

¹²⁶ Shahbazi-Nia (2007), p. 253, (Translation S.A).

¹²⁷ Guardian Council's Interpretation no.7484, which was issued on 1-1-1987.

¹²⁸ Some of the law experts who have criticized the Guardian Council interpretation no.7484 are: R. Eskini, "The Power of Governments and Governmental Organizations to Refer to International Trade Arbitration [اختیار دولت ها و سازمان های دولتی در مراجعه به [داوری تجاری بین المللی]"]", *Faculty of Law Journal of Tehran University* [مجله دانشکده حقوق دانشگاه تهران] (1991), p. 55; and Shahbazi-Nia (2007), p. 262.

authorized by Parliament, referral of disputes to court should also be subject to an approval (by the Parliament).¹²⁹

In comparing the referral to arbitration with referral to courts, another expert says:

How can it be accepted in Iran's constitutional law that a foreign judge whose competence is taken from a domestic law is more independent and impartial than the arbitrators that the Iranian party to a dispute has a role in their appointment?¹³⁰

This argument is worth considering. It is not clear why the Guardian Council restricted the scope of the mentioned Principle to non-judicial dispute settlement mechanisms. This interpretation of the Guardian Council is also inconsistent with the wording of Principle 139 and also some of its relevant reasoning on the constitutionality of multilateral agreements.¹³¹ However, the Guardian Council is the only competent constitutional body which can interpret the principles of Iran's Constitution. Therefore, its narrow interpretation with regard to the mentioned Principle must be accepted. The main purpose of the Principle 139 requirements, as discussed above, is to avoid corruption through efficient parliamentary supervision of the referral of disputes to dispute settlement systems. I think that in international and multilateral dispute settlement systems that corruption cannot be relevant. This can be why the Guardian Council sometimes differentiates between judicial and non-judicial dispute settlement systems in the referral of state and public property disputes.

There are some other views which have given a narrower interpretation than the Guardian Council itself by ignoring the term 'settlement of claims' stated in the wording of Principle 139 of the Constitution and restricting the Principle just to '*referral to arbitration*'.

Accession to the WTO dispute settlement system (by Iran) does not have any legal impediment. Except for the referral of disputes to

¹²⁹ Eskini, id, (Translation S.A).

¹³⁰ Shahbazi-Nia (2007), p. 262.

¹³¹ See chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

arbitration, which due to the centralization of foreign trade in the hands of the Government, the implementation of Principle 139 of the Constitution is necessary.¹³²

According to this view, the requirements of Principle 139 of the Constitution are restricted to arbitration and other methods of dispute settlement are not relevant to Principle 139. Therefore, only if there is a referral of a state and public property dispute to arbitration in multilateral dispute settlement systems such as the DSS, an authorization from the Parliament is required. As discussed above, the WTO DSS is not an arbitration system, even though it also includes an arbitration mechanism. This, I believe, results from a pragmatic view which formed over years of practice in relation to Principle 139 by the Government.

This view is also worth examining. The reasoning with regard to restricting the scope of Principle 139 to arbitration cannot be accepted, since it is inconsistent with the wording and purpose of the mentioned Principle. However, the exclusion of multilateral courts from the scope of the Principle can be accepted because the Guardian Council, as the constitutional court of Iran, accepted it through its interpretation. This narrow interpretation, which excludes all dispute mechanisms other than arbitration, does not seem to be consistent with the wording and the purpose of the Principle.

There are also some discussions with regard to the deficiencies of the Principle. One of the most important deficiencies mentioned in the doctrine concerns the sanction and enforcement mechanism. It is criticized on the grounds that it is not actually provided for in the wording of Principle 139 of the Constitution. Among the arguments addressing this problem, there are some suggestions made to remove the deficiencies of the mentioned Principle.

As there is no sanction stated on noncompliance with Principle 139, it should be considered under the general 'civil' sanctions. Therefore, it seems that referral of a current or future dispute on a foreign

¹³² M. Mohebbi and A McGee, "The WTO Dispute Settlement Procedure [آیین حل و فصل [فصلنامه دیدگاههای حقوقی قضایی]], *Legal-Judicial Views Journal* [اختلافات سازمان تجارت جهانی] (1997), p. 76, (Translation S.A).

investment as a part of a main contract, if the legal formalities are not observed, is considered as not valid (binding). It is clear that this is invalid just until the conditions of the Principle are not applied.¹³³

Some other suggestions which have been discussed by jurists to improve the enforcement of Principle 139 of the Constitution are presented below.¹³⁴

- A precise definition of the state and public property should be given through the Parliament (but it should be ensured that this definition does not give rise to new ambiguities);
- Determination by the Parliament on whether the approval of the Parliament should be before or after the dispute;
- The process of the Government's approvals with regard to Principle 139 should be clarified (and should be shortened);
- The process of the Parliament's approvals with regard to Principle 139 should be clarified (and should be shortened based on the type of the contract in terms of its amount or importance);
- Criminal punishments should be approved by the Parliament for noncompliance with the conditions stated by Principle 139.

To summarize the above arguments, there is no doubt among Iranian jurists as to the restrictions imposed by Principle 139 such as the clear requirement on the settlement of disputes or referral to arbitration which should be approved by the Parliament when it is relevant to the state or public properties. Nevertheless, some legal discussions address the question whether this permission should be taken from the Parliament when a contract contains an arbitration clause or dispute settlement system, or only in cases where an actual dispute has arisen. In other words, as the wording of Principle 139 states, '*The settlement of claims or the referral thereof to arbitration*' should be approved by the Parliament. Therefore, some argue that this should be interpreted to mean that when there is no claim (dispute) there is also no restriction. This argument is rejected by most jurists due to the purpose of Principle 139, its practice by the Parliament and the Government of Iran which is based on their understandings of the Principle and also, the most important, the legal consequences which can be caused by the mentioned argument. It is obvious that when a main contract which also includes an

¹³³ Shahbazi-Nia (2007), p. 255, (Translation S.A).

¹³⁴ Mohebbi (1997), p. 76, (Translation S.A).

arbitration clause or dispute settlement system is adopted by the Parliament without considering the Principle 139 requirements, then, it might be very difficult, for example, to stop the process of referral to arbitration from getting the required authorization from Iran's Parliament, which may also be time consuming. One of the jurists says:

It is obvious that 'the condition of referral to arbitration' (stated by Principle 139 of the Constitution) is meant when a contract at the time of its conclusion becomes under control of the Parliament. Otherwise, when the contract is signed, in case of a dispute, whether we like it or not, the other parties of the contract refer the dispute to international settlement systems.¹³⁵

It is undoubtedly very reasonable to expect that the requirements stated by Principle 139 will be observed by Iran's Parliament while adopting a contract that includes dispute settlement provisions. Therefore the mentioned requirements are binding upon the contract and it should be clarified for the other party of the contract. Otherwise it would be in conflict with the *bona fide* principle in contract law between the parties of a contract. If the Iranian party to a contract does not declare the restrictions of its domestic law on dispute settlement provisions of that contract, the other party signs the contract without considering the applicable restrictions to the mutually agreed contract.

A very important question is raised with regard to the legal consequences of a violation of Principle 139 by Iran's Parliament. The violation can occur when a contract with foreigners including dispute settlement mechanisms is approved. If, in approving such a contract, the requirements of Principle 139 have not been observed by the Parliament, what would be the legal consequences? In other words, if a dispute arises after the conclusion of such a contract, can the foreign party avoid the implementation of Principle 139 requirements by Iranian party on the basis of good faith? This question is very important since the Iranian party sometimes needs its domestic legal system to recognize the result (award and judgment) of a state or public property dispute. Otherwise the result of such a dispute cannot be recognized and

¹³⁵ Mir Abbassi (1999), p. 43, (Translation S.A).

enforced by Iran's legal system. This question can be discussed from two different perspectives: i) domestic; and ii) international.

Due to the hierarchy of norms in the Iranian legal system, Iran's Constitution prevents the Iranian legal system from legally recognizing anything that contravenes it. Therefore, if an approval of the Parliament has not been given for instance, for a referral to arbitration when the Parliament has approved the main contract, it can be asserted that the legal system of Iran will not recognize that referral and also its legal results, unless it is authorized by Iran's Parliament later.

It can also be questioned whether this deficiency affects the entire contract or just the dispute settlement provisions. If this deficiency is so important that it could undermine the consent of the foreign party to the extent that, if it was informed of these requirements, it would not have consented to the contract, then it can be claimed that this contract has been void from the beginning. There are also some discussions, mostly by non-Iranian legal experts, on ignoring the domestic restrictions in international dispute settlement that have led to a practical analysis in international arbitration which is presented below.

As the current practice of international arbitrations is not willing to recognize domestic restrictions such as those enshrined in Principle 139 of Iran's Constitution, an international aspect of the above-mentioned issue must be considered.

It has to be noted that international arbitral practice has shown some reluctance to accept the plea of a lack of capacity, be it a commercial corporation or a State entity, where they have made such a plea by reference to the law of their incorporation or of their domicile. This reluctance of the arbitral practice has been justified on the grounds of the principle of good faith.¹³⁶

It is again worth mentioning that although, as mentioned above, looking at the issue from the side of a foreign party, invoking domestic restrictions by an Iranian party without mentioning them in the contract might be in conflict

¹³⁶ Seifi (1998), p.12, (Translation S.A).

with the good faith (*bona fide*) principle, but as one of the Iranian jurists says, it can also result in the non-recognition of, for example, a WTO Panel's report on a dispute, within Iran's domestic legal system:

The international practice has a tendency towards not recognizing a reference in international relations to a noncompliance with formalities which, based on the domestic law of each country, results in the invalidity of an arbitration clause.¹³⁷

This view with regard to the invalidity of arbitration if the domestic restrictions are disregarded is also admitted by a number of authors from outside Iran, although other jurists in international trade law do their best to focus on the aforementioned international practice and in particular on the *good faith* principle.

Lack of subjective arbitrability to enter into an arbitration agreement makes the agreement void. Therefore, private parties should verify that no such restrictions exist when they enter into an arbitration agreement with a state party. It is generally recommended to include an express reference in the arbitration agreement that the state party has complied with all necessary procedures.¹³⁸

The international aspect taken from some arbitration awards, which do not recognize the domestic law restrictions on capacity¹³⁹ or arbitrability¹⁴⁰ issues, is addressed as an 'international public policy'¹⁴¹ issue and has resulted in a gradual removal of such restrictions from the domestic laws of several countries. For example, there were some similar restrictions in Saudi

¹³⁷ K. Kaviani, "Principle 139 of the Constitution and Arbitration Clause in Agreements Approved by the Parliament [اصل 139 قانون اساسی و شرط داوری در قراردادهای مصوب مجلس شورای اسلامی]", *Research on Law and Politics Journal* [مجله پژوهش حقوق و سیاست] (2002), p. 138, (Translation S.A).

¹³⁸ J.D.M. Lew, LA Mistelis, and S Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 735.

¹³⁹ Poudret and Besson (2007), p. 182.

¹⁴⁰ Ibid.

¹⁴¹ L.A. Mistelis, "Arbitrability: International and Comparative Perspectives, Is Arbitrability a National or an International Issue?," in LA Mistelis & SL Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), p. 2.

Arabia's¹⁴² legal system in the past which were changed to be compatible with the so-called current international practice.

Another issue which has been duly examined in the literature is that Iran should be able to stop the process of sending an issue to a dispute settlement system or arbitration when it is not approved by its Parliament during the approval of the main contract containing the dispute settlement system provisions. Iran as a complainant is free to choose whether or not to use a dispute settlement system against the other party to a dispute. If Iran's Parliament decides not to refer a dispute to the WTO Dispute Settlement System and the dispute is raised under the WTO agreements, it cannot take it to the other dispute systems due to the exclusive and compulsory jurisdiction of the WTO. If the other party to the dispute starts using, for example, the WTO dispute settlement system against Iran, is it still possible for Iran to rely upon its domestic restrictions? In other words, if Iran would be called as a respondent to an arbitration dispute, could it make its participation dependent on its Parliament's approval? Would this argument based on its domestic law restriction be accepted by the international arbitrators?

To provide more clarity, these questions are also addressed in the subsequent chapter from the point of view of some international arbitral awards.

To conclude, taking the requirements of Principle 139 under closer consideration from the doctrinal interpretation perspective implies that most Iranian law experts believe that the legal conflict between Principle 139 and the WTO DSU still exists and it would result in a legal impediment to Iran's accession to the WTO and it cannot be removed through the discussed views of doctrinal interpretation.

After the detailed discussion of the interpretations of Iran's constitutional rules on the settlement of state and public disputes, there are some other views on the legal impediment and also other legal issues, as well as some key questions discussed below.

¹⁴² Lew, Mistelis, and Kröll (2003), pp. 734-735.

5.4. Legal Issues of Accession to the WTO

The interpretations of Principle 139 have been discussed above in order to recognize whether the conflict between Iran's Constitution and the WTO Dispute Settlement Understanding (DSU) can be removed based on the interpretations. On the basis of some discussed interpretations, there are some issues to be discussed below.

The first question is whether Principle 139 can be interpreted as limited either to private or to governmental entities? (5.4.1). Also, there is a view which asserts that there is no legal impediment to Iran's WTO accession on the basis of Principle 139. This view is discussed below (5.4.2). Also there are some legal issues discussed below on checking the national interest, constitutionality by some Iran's constitutional institutions (5.4.3) and also an argument whether non-Muslim judges in multilateral and bilateral disputes are recognized by Iran's legal system (5.4.4).

5.4.1. Can Principle 139 be interpreted as Limited either to Private or to Governmental Entities?

The first question, therefore, is whether the term 'non-Iranian' (foreigner) in the wording of Principle 139 can be limited to private individuals? This is a key question because if it does not include governments, there would not be the legal conflict between this Principle and the WTO dispute settlement system.

To answer to this question, by reviewing the wordings and legal interpretations of Principle 139, no term can be found to restrict 'non-Iranian' to mere private entities. Legally speaking, therefore, by the term 'non-Iranian', a general meaning, including both governmental and private entities, has been intended by the constitutional law makers (Assembly of Experts for the Constitution).

It should also be taken into consideration that the legal interpretations of Principle 139 certify that the main emphasis has always been on the terms 'state and public property'. In other words, Principle 139's wordings should be interpreted in a way that people's property be preserved and damages resulting from corruption in dispute settlement be avoided. That is why resolution of state and public property disputes between any Iranian entity and non-Iranian entity should be notified to the Parliament to stay immune of

any damages. It also bears mentioning that as there has been no doubt about the broad meaning of the term ‘non-Iranians’ in the wording of Principle 139 of the Constitution, this term has never been questioned/examined by any legal interpretations. To conclude, restricting the Principle 139 either to governments or private entities would be in conflict with the general wording and also the main purpose for which this rule has been formed. It bears mentioning that any further interpretation/clarification on the legal terms of Principle 139 should be issued by the Guardian Council to be applied by Iran’s constitutional institutions. However, limiting Principle 139 to either governmental or private entities cannot resolve Iran’s WTO accession issues.

5.4.2. No-Conflict View

To support a no-conflict view, there are some arguments as to whether the Principle 139 requirements still exist. If the restrictions stated in Principle 139 on referral of state and public property disputes do not exist, there will be no conflict and, therefore, there would not be such a legal impediment to Iran’s accession to the WTO. This is also the case if the Principle 139 restrictions do not work or if they do not prevail due to factors, such as:

- changes of time;
- the development of mechanisms in international and multilateral dispute settlement systems;
- international public order and practice;
- achieved purposes of the requirements stated by Iran’s legal system.

Some of these factors are introduced below.

As discussed in this chapter,¹⁴³ there is another view which no longer supports Principle 139 as a problem/restriction to the settlement of international disputes. Under this view, domestic law restrictions, such as the requirements stated by Principle 139, were justified on the basis of ‘public policy’ by some countries¹⁴⁴ – but some international arbitral awards did not value them at the

¹⁴³ See section 5.3.6. “Doctrinal Interpretation”.

¹⁴⁴ For example: France, Article 2060-1 of the *Code Civil* (law reform of July 5th, 1972), See K. Youssef, "The Death of Inarbitrability," in L. Mistelis & S. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), pp. 58-59.

international level.¹⁴⁵ However, the new 'international public order'¹⁴⁶ has resulted in a gradual removal of such restrictions from the domestic laws of several countries, such as the restrictions in Saudi Arabia's legal system in the past that were changed to be consistent with the current international practice. Therefore, even if such restrictions exist in domestic law, the 'international public order' would not recognize them if they would be invoked by Iran in an international/multilateral dispute. This is discussed in detail in 6.3.1. International Arbitrations

It must be taken into consideration that the discussed *blanco* approval approach with regard to the requirements of Principle 139 has been followed by Iran's Government over several decades. This indicates that the 'purposes' for which such restrictions were made could have been affected due to the changes over time and the development of international dispute settlement mechanisms. As discussed in the teleological interpretation,¹⁴⁷ the main purpose of Principle 139 restrictions is to give Iran's Parliament an effective supervision to combat corruption in the settlement of state and public property disputes. This, as also discussed in historical interpretation,¹⁴⁸ is a declared concern by drafters of Principle 139 in the discussions of the Assembly of Experts for the Constitution.

However, the *blanco* approval approach has been neither recognized by Iran's Parliament¹⁴⁹ nor the Guardian Council which exclusively interpret the Constitution.¹⁵⁰ That is why, as discussed in chapter four,¹⁵¹ the Guardian Council has sent back several multilateral and bilateral agreements to the

¹⁴⁵ Tunisian, Algerian, Egyptian, Lebanese, Saudi Arabian laws which included some restrictions on international arbitration were amended to be consistent with the international legal order. See Youssef (2009), pp. 62-63.

¹⁴⁶ How this order has been formed will be discussed in the subsequent chapter.

¹⁴⁷ See section 5.3.5. (Teleological Interpretation).

¹⁴⁸ See section 5.3.2. (Historical Interpretation).

¹⁴⁹ This is discussed in chapter 6, section 6.3.2.1. (The Iran-United States Claims Tribunal and Principle 139) that this approach was criticized by the Parliament in 'Iran-United States Claims Tribunal Arbitration Process' and in 2008 was sent by the Parliament to the courts as a Government's violation (non-compliance with the Constitution).

¹⁵⁰ See section 5.3.3. (Authentic Interpretation).

¹⁵¹ See chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

Parliament because of an inconsistency with the requirements of Principle 139 of the Constitution.

Even if the international and multilateral dispute settlement systems do not recognize the domestic law restrictions such as the Principle 139 restrictions, Iran's Government cannot legally recover its incapacity when the required authorization is not given by the Parliament. This is because the Government is not capable of waiving the restrictions and, if it does not observe the requirements for joining international and multilateral agreements, it would result in a defect from the view of that country's legal system. Therefore, the legal consequences of non-compliance with the constitutional requirements can result in controversial domestic legal issues. A detailed discussion is beyond the limited scope of this chapter.

To conclude, the restrictions under Principle 139 have been sometimes ignored by the Government in joining international, multilateral or bilateral agreements. This supports the view that this practice can also work in Iran's accession to the WTO, and accordingly it would not cause such a legal impediment in Iran's accession process. However, this does not eliminate the required legal capacity of the Government under Iran's legal system.

To recognize whether this legal impediment can be removed in the adoption of Iran's accession to the WTO by the Parliament, the Guardian Council or the National Expediency Council, a brief discussion is presented below.

5.4.3. National Interest and the Parliament, Guardian Council and the NEC

It was discussed above that, under Iran's constitutional system, the Government is not legally capable of waiving the restrictions stated by Principle 139, even though it has done so in several cases. This implies that the *blanco* approval approach may have been merely a pragmatic solution in dealing with international agreements and disputes. The pragmatic solution has been used by the Government to maintain the national interest of the country. However, this solution is not recognized by the Parliament and other relevant constitutional institutions of Iran. The question is why the Parliament and other constitutional institutions, other than Government, do not take the national interest into account in the adoption of the accession process to multilateral agreements like the WTO?

To answer this question, it bears mentioning that, as it was discussed in chapters three¹⁵² and four,¹⁵³ in adopting multilateral agreements, the Parliament should also take into account the national interest of the country. However, under Principle 72 of the Constitution, it cannot adopt anything that is inconsistent with the constitutional principles. Principle 72 states:

The Islamic Consultative Assembly cannot legislate laws that contradict the canons and principles of the official religion of the country or the constitution. The Guardian Council is responsible for the evaluation of this matter, in accordance with Principle 96.¹⁵⁴

Article 196 of the Parliament's Rules of Procedure has recognized the obligation of the Parliament to check the constitutionality with regard to its approvals. Therefore, the constitutionality shall be checked by the Parliament before adopting Iran's accession to multilateral agreements such as the WTO and, therefore, the constitutional requirements stated by Principle 139 cannot be ignored. That is why in the adoption process of the WTO accession protocol, the Parliament is expected to undertake a case-by-case approval approach to comply with the Principle 139 requirements.

It can also be questioned why the Guardian Council cannot perform a constitutionality review on the basis of national interest? If the Guardian Council could do so, there would not be a legal impediment to Iran's accession to the WTO.

To answer to this question, it bears mentioning that there are some limited tasks given to the Guardian Council by the Constitution.¹⁵⁵ Regarding the adoption process of multilateral agreements like the WTO, the Council shall only check the constitutionality. If the agreement is inconsistent with the constitutional rules or Islamic principles, it shall be sent back to the Parliament to be amended there. The Council is not authorized by the

¹⁵² See chapter 3, section 3.6.3.1. (Role of Parliament in Concluding Multilateral Agreements).

¹⁵³ See chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process) and section 4.3.4. (Who Checks the Constitutionality in Accession Process?).

¹⁵⁴ Principle 72 of Iran's Constitution.

¹⁵⁵ For further information on the tasks of the Guardian Council see chapter 3, section 3.5.4.2. (Guardian Council).

Constitution to act on the basis of national interest with regard to a multilateral agreement or other parliamentary approvals which are referred to be checked for constitutionality.

However, a parliamentary approval – such as Iran’s WTO accession protocol – including unconstitutionality can be sent to the National Expediency Council (NEC)¹⁵⁶ to be examined on the basis of national interest.¹⁵⁷ In doing so, those Members of the Guardian Council who are also Members of the NEC, as well as other Members, will decide about the agreement on the basis of national interest. Therefore, a *blanco* approval approach can only be performed for Iran’s accession to the WTO by the NEC.

It bears considering that the NEC cannot interpret the Constitution.¹⁵⁸ This is because this task is exclusively given by the Constitution to the Guardian Council. This is discussed in chapter three.

Another argument concerns the temporal nature of NEC’s decisions. The decisions of the NEC are temporal, however, it is obvious that the decisions regarding the adoption of international, multilateral and bilateral agreements cannot be temporal. In practice, the NEC decisions on Iran’s accession to multilateral agreements support this view that these decisions are not temporal. For further discussions see the relevant section in 3.6.4.2. Important Questions on the National Expediency Council.

5.4.4. DSS Judges can be Non-Muslims

As discussed in chapter three,¹⁵⁹ Iran’s Constitution requires that the judges shall be appointed by the Head of the Judiciary.¹⁶⁰ Under Islamic principles, to

¹⁵⁶ The National Expediency Council is a constitutional institution to resolve the disputes between the Parliament and the Guardian Council on constitutionality, see chapter 3, section 3.5.5. (National Expediency Council).

¹⁵⁷ See chapter 4, section 4.3.5. (The Role of the National Expediency Council in the Accession Process).

¹⁵⁸ See chapter 3, section 3.6.4.2. (Important Questions on the National Expediency Council).

¹⁵⁹ See chapter 3, section 3.5.6. (Judiciary).

¹⁶⁰ Principle 158 (3) of Iran’s Constitution states: ‘The duties of the Judiciary are as follows: ...3. Employing just and meritorious judges, dismissing and appointing them, changing their place of assignment, specifying their jobs, promotions, and similar administrative affairs, in accordance with the law.’

be a judge, there are some required qualifications such as being Muslim and having Islamic jurisprudence (*Ijtihad*). However, as there are few people with these qualifications, the Head of the Judiciary can also appoint legal expert Muslims who do not possess Islamic jurisprudence as qualified judges.

It bears considering that an examination of the adoption process of some bilateral agreements on judicial assistance and the extradition of criminals indicates that the Guardian Council does not recognize the competence of judges from other countries, even if they are Muslim. For instance, the bilateral agreements between Iran and Algeria or Afghanistan were declared by the Guardian Council as being inconsistent with Islamic principles (Principle 4 of the Constitution¹⁶¹). The Guardian Council's reasoning on the unconstitutionality of the bilateral agreement between Iran and Afghanistan is presented below:

As stated in other similar agreements, this bill (of bilateral agreement) is recognized (by the Guardian Council) as inconsistent with Islamic principles (of Iran) because of:

- the generality of a number of its articles, such as Article (17) which enforces the application of Afghanistan's rules that are inconsistent with Islamic principles; and
- several articles (of the agreement) require the confirmation of the authenticity of laws and procedural rules of the Judiciary of Afghanistan; and also,
- referral of judicial activities to the courts of that country which gives (legal) effect to the judgments issued even inconsistent with Islamic principles by Afghanistan's courts.¹⁶²

¹⁶¹ Principle 4 of Iran's Constitution states: 'All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle governs all the principles of the Constitution, and other laws and regulations. The determination of such compatibility is left to the Fiqaha of the Guardian Council.'

¹⁶² The Guardian Council Opinion no. 8/30/37228 issued on 27 Jan. 2011 concerning the bill of bilateral agreement on judicial assistance between Iran and Islamic Republic of

The Guardian Council in section (1) of its opinion no. 80/21/1523 (7 June 2001) regarding mutual legal and judicial assistance states: 'Considering that the judicial proceeding and issuing judgment shall be performed by an appointed qualified judge on the basis of Islamic rules and principles, as the generality of Article 10 includes cases other than this, it is recognized as inconsistent with Islamic principles.'¹⁶³

According to the above-mentioned reasoning/opinions of the Guardian Council, the judgments of courts/judges of Afghanistan and Syria can be rejected by Iran's legal system, even though they are Muslim countries. It bears considering that they can be Muslim judges, however, as it is also mentioned by the Council in its opinion no. 80/21/1523, they are not appointed on the basis of Iran's legal system. There are a number of cases which followed similar reasoning by the Guardian Council on bilateral agreements on judicial assistance between Iran and other countries, such as Algeria, China, India, and Syria.¹⁶⁴

Therefore, Iran's accession to the WTO can be taken by the Guardian Council as being inconsistent with Islamic principles due to the judgments (DSB rulings, suggestions and awards) which can be issued in the WTO dispute settlement system by panels, the Appellate Body, Arbitration, etc. That is to say this is also a legal impediment which can block Iran's accession to the WTO.

To remove such a legal impediment, it should be taken into consideration that most multilateral and bilateral agreements which have been rejected by the Guardian Council using similar reasoning were finally adopted by the National Expediency Council. Therefore, the same solution could be suggested to resolve such a similar legal impediment (inconsistency with Islamic principles) with regard to Iran's accession to the WTO. A more

Afghanistan. (Translation S.A), see the website of Research Centre of Iran's Parliament at: <http://rc.majlis.ir>, last visited on 1-10-2016.

¹⁶³ The Guardian Council opinion no. 80/21/1523 (7 June 2001). (Translation S.A). For further information see the Council's website.

¹⁶⁴ The Guardian Council's opinion on Algeria's agreement: 90/30/46182; on China's agreement: 92/30/52224; and on India's agreement: 88/30/33770. For further information see the website of Research Centre of Iran's Parliament at: <http://rc.majlis.ir>, last visited on 1-10-2016.

detailed discussion on this solution is presented in chapter seven, section 7.4. (Suggestions Based on Iran's Domestic Legal System).

5.5. Conclusion

In chapters three and four it was recognized that there is a legal impediment to Iran's WTO accession as a result of Iran's Constitutional requirements on dispute settlement. Under Principle 139 of Iran's Constitution, the referral of state and public property disputes to multilateral and bilateral dispute settlement system should be authorized by the Parliament. This chapter's focus is on:

- a detailed analysis of the important constitutional requirements on multilateral dispute settlement;
- a discussion on whether the legal impediment can be removed through legal interpretations; and
- consideration of some relevant questions.

In analyzing the legal issues, two key elements of Principle 139 have been scrutinized on the basis of several interpretations:

- whether Principle 139 requirements are restricted to a referral to arbitration?
- whether a case-by-case or a *blanco* approach is required by the Constitution for a referral to dispute settlement systems.

The examination of the mentioned legal issues shows that, even though the Guardian Council, through an interpretation of Principle 139, has excluded a referral to multilateral judicial systems, the wording of Principle 139 requires parliamentary supervision of all dispute settlement mechanisms. The wording also supports a case-by-case approach. However, the Government has practiced a *blanco* approach on the basis of finding a pragmatic solution.

To remove the legal impediment from Iran's WTO accession, several legal interpretations of Principle 139 have been examined closely. Under the literal interpretation, the relevant legal terms, which have resulted in the legal impediment, have been reviewed. Then the main purpose of having the domestic restrictions on dispute settlement, which is to prevent corruption, has been studied from a historical interpretation perspective.

Some interpretations issued by the Guardian Council on Principle 139 have been discussed from an authentic interpretation point of view and it is concluded that, due to the hybrid nature of the WTO DSS mechanisms, the interpretations cannot remove the legal impediment. The systemic interpretation will be discussed in the subsequent chapter, to examine the practical implementation of Iran's dispute settlement requirements by its constitutional institutions.

To find out whether the main purpose of domestic restrictions on dispute settlement, such as the one in Iran's constitutional system, are still necessary for multilateral dispute settlement mechanisms such as the WTO DSS has been discussed from a teleological interpretation perspective. It was mentioned that most countries have removed such restrictions from their legal systems.

Under a doctrinal interpretation, various views of scholars regarding such restrictions have been argued. It is concluded that, in concluding contracts, the legal principle of 'good faith' requires that such a requirement be introduced to the other parties to the contract. Otherwise, even though invoking the domestic restrictions would not be accepted by international dispute settlement systems, the lack of the required authorization from Iran's Parliament can result into serious legal consequences for the recognition and enforcement of the relevant judgments and awards in Iran. This result would be almost the same with regard to ignoring the domestic restrictions under a no conflict view, which can be a result of, for instance, new changes in international trade, business and investment.

Finally, it was discussed that the Guardian Council cannot ignore unconstitutionality on the basis of national interest. However, Iran's Parliament or the National Expediency Council can do this. Furthermore, there can be another legal impediment to Iran's WTO accession due to the required qualifications necessary for judges to have the capacity to issue judgments and awards under Iran's legal system, which can also be extended to include the WTO DSS rulings and awards.

To conclude, the legal impediment to Iran's WTO accession cannot be removed on the basis of the legal interpretations which have been discussed in this chapter. It will be discussed in the subsequent chapter whether the

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practical implementation of Principle 139 by Iran's constitutional institutions and international arbitrations could remove this legal impediment.

Chapter 6: Actual Legal Practice in Relation to Principle 139 to Remove the Legal Impediment of Iran's WTO Accession

6.1. Introduction

It was discussed in chapter one that, to join the WTO, Iran needs to follow the WTO accession process. However, due to the compulsory jurisdiction of the WTO dispute settlement system (DSS), as discussed in chapter two, there is a conflict between Iran's Constitution and the WTO Dispute Settlement Understanding (DSU). How Iran's accession to the WTO can be adopted by Iran's constitutional institutions was discussed in chapters three and four. Therefore, through chapters one to four it was recognized that, due to the conflict between Principle 139 of Iran's Constitution and the WTO DSU, there is a legal impediment to Iran's accession process which is discussed in this research (the first research question).

The legal interpretations of Principle 139 were discussed in chapter five to find out whether the mentioned legal impediment can be removed through these interpretations (part one of the second research question).

In this chapter, the second part of the second research question is discussed to recognize whether the conflict between Iran's Constitution and the WTO DSU can be removed through the current legal practice in relation to Principle 139. To illustrate Iran's practice in relation to Principle 139, first how this Principle is enforced by the Parliament is taken into consideration in this chapter (6.2.1). Iran's Parliament has approved a number of laws which can be divided in two categories: the group which tries to echo the requirements stated in the mentioned Principle and to maintain its enforcement by other laws and regulations; and the second group concerns the laws by which one can examine whether the Parliament and the Government have observed the requested requirements stipulated in Principle 139.

After the Parliament, how Iran's Government deals with the requirements of Principle 139 is discussed in this chapter (6.2.2). It is analyzed that the Government can rely upon two procedures to approve a referral to arbitration: *approvals on sending issues of referral to arbitration (or other dispute*

settlement methods) to the Parliament to be approved; and approvals on other aspects of Principle 139 which merely concerns the Executive.

After discussing how Principle 139 of Iran's Constitution is addressed in practice by Iranian institutions, it is analyzed in this chapter how this Principle has been dealt with in international arbitrations (6.3). It bears mentioning that there are two arguments which can support the view that there is no conflict between Iran's Constitution and the compulsory jurisdiction of WTO DSS. The first view is taken from the practice in relation to Principle 139 in general at the international level and the second is the legal application of this Principle by a specific arbitration tribunal. These two practices are presented in this chapter as: international arbitrations (6.3.1) and Iran-United States Claims Tribunal and Principle 139 requirements (6.3.2). Finally, how the *blanco* approval approach has been followed by Iran's Government, and some questions on how Iran's accession to the WTO can be adopted by Iran's constitutional institutions are taken into consideration in this chapter.

After discussing the legal interpretations of Principle 139 (chapter five) and how this Principle has been dealt with by Iran's constitutional institutions, as well as international tribunal (this chapter), it will be discussed in the subsequent chapter what are the practical solutions to remove the legal impediment to Iran's WTO (the third research question).

6.2. Principle 139 in Practice

To establish the practical implementation of Principle 139, one needs to examine the governmental and parliamentary rules enforcing the requirements of the mentioned Principle. These rules can be addressed as the practical interpretations of Principle 139, which show the current '*legal order*' of the Iranian system on the settlement of state and public property disputes. There are some parliamentary laws and governmental regulations on the enforcement and practical implementation of Principle 139, which are presented below to offer a better understanding of the aforementioned Principle and in order to recognize whether the legal conflict between the Principle and the DSU can be removed.

6.2.1. Enforcement of Principle 139 by Iran's Parliament

Concerning Principle 139 of the Constitution, the Parliament of Iran has approved a number of laws. They can be divided in two categories: the first category is the group which tries to echo the requirements stated in the mentioned Principle and to maintain its enforcement by other laws and regulations and the second group includes laws by which one can examine whether the Parliament and the Government have observed the requested requirements stipulated in that Principle.

With regard to the first category, which restates the requested requirements of Principle 139 of the Constitution, there are at least two major laws that relate to the discussion at issue:

1. *Iran's Civil Procedure Code* (2000)
2. *Law on International Commercial Arbitration* (1997)

1. *Iran's Civil Procedure Code* (2000)

Article 457 of Iran's *Civil Procedure Code* (2000) restates the importance of Principle 139 of Iran's Constitution. This article, which forms part of the articles in the *Civil Procedure Code* that address arbitration, reminds us of the requirements of arbitration where the other party to dispute is non-Iranian and public and state properties are involved. As the principles of the Constitution cannot be directly referred to in a judicial procedure,¹ this article very clearly describes the requirements to be observed and that also can be relied upon before a court or tribunal. It is noticeable that the control of the Guardian Council merely extends to parliamentary approvals and cannot be directly appealed to in proceedings relating to courts and arbitrations, which are otherwise not sent to the Parliament. In other words, if there is a private contract including states or public property, under Principle 139, the referral of disputes related to the private contract to arbitration shall be authorized by

¹ According to the Iranian legal system, Iran's constitutional rules do not have 'direct effect' (i.e. they do not create rights and obligations for the parties) in its domestic courts, unless in the form of a law issued by the Parliament.

the Government.² However, because this contract and its relevant disputes are not adopted by the Parliament, the Guardian Council cannot check its constitutionality. Therefore, Article 457 was drafted to better ensure compliance with this Principle. This Article states:

Referral to arbitration of disputes relating to public and government (state) property requires the approval of the Board of Ministers and the notification of the Parliament, and where the other party to the dispute is non-Iranian or the subject of the dispute is regarded by law as serious, the approval of the Parliament is necessary.³

As it is stated in this Article, the requirements of Principle 139 are echoed in Iran's *Civil Procedure Code* and have to be taken into consideration in the relevant arbitration procedures.

2. *Law on International Commercial Arbitration* (1997)

Another law which is approved to include international arbitration is the '*Law on International Commercial Arbitration*'. Although this law does not explicitly mention the terms of Principle 139 of the Constitution, as is described in Article 457 of the *Civil Procedure Code*, Article 34 states the conditions under which an arbitration award is '*null and void*'. This Article provides:

Nullity of award: In the following instances, the 'arbitrator's' award is fundamentally null and void and unenforceable:

- 1- Where the principal subject-matter of the dispute is not capable of settlement by arbitration under the laws of Iran.
- 2- Where the content of the award is contrary to the public policy or good morals of the country or the mandatory provisions of this Law...⁴

² It bears considering that if the dispute on state or public properties is with non-Iranians, the referral to arbitration or other dispute settlement systems shall be authorized by the Parliament.

³ Article 457 of Iran's Civil Procedure Code. (Translation WIPO: <http://www.wipo.int/wipolex/en/profile.jsp?code=IR>).

⁴ (Translation Tehran Regional arbitration Centre), for further information see: <http://www.trac.ir>, last visited on 1-10-2016.

As mentioned above, the requirements of Principle 139 are not stated in this article, but sections (1) and (2) implicitly refer to some rules including Principle 139. Therefore, if the requirements stipulated in that Principle are not observed in an arbitration tribunal, pursuant to this law, the award will not be recognized by Iran's legal system. Seifi (1998), an Iranian international arbitrator, clarifies the above-mentioned understanding of Article 34 in the following:

Article 2(2) of the Act explicitly provides that all persons having the capacity to institute legal proceedings can refer their disputes to arbitration. Two points are notable in this respect. First, the legal capacity of non-Iranian nationals, including corporate entities, shall be determined pursuant to their respective national laws. Second, in view of the express reservation made in Article 36(2) of the Act, the limitation placed on the Iranian State-controlled entities by virtue of Principle 139 of the Constitution of the Islamic Republic of Iran would still continue to exist.⁵

In addition to the above-mentioned laws, the second group includes several laws which are approved by the Parliament to apply the requirements of Principle 139 of the Constitution. These laws, based on Iran's Constitution, first were sent to the Parliament by Iran's Government (after being approved by the *Council of Ministries*) and then were approved by the Parliament.

As discussed above, Iran's Parliament has done its best not only to implement the requirements of Principle 139 of the Constitution, but to enforce them through laws. This practice also shows that the Parliament believes in full compliance with the mentioned constitutional rules on arbitration and other mechanisms of dispute settlement in relation to state and public property.

To conclude, under a systemic interpretation of Principle 139, the requirements of this Principle on dispute settlement are usually taken into consideration by the Parliament on a case-by-case approval approach. Therefore, the legal impediment to Iran's accession to the WTO cannot be

⁵ J. Seifi, "The New International Commercial Arbitration Act of Iran -Towards Harmony with the UNCITRAL Model Law", *Journal of International Arbitration* (1998) 15, p. 12.

removed through the practical implementation of Principle 139 by Iran's Parliament. In other words, when adopting Iran's WTO accession protocol, the Parliament would comply with the requirements of Principle 139 on the basis of a case-by-case approval approach.

To determine whether the discussed legal impediment can be removed through Iran's Government's approach in dealing multilateral agreements, the enforcement of Principle 139 of the Constitution by the Government is examined below.

6.2.2. Iran's Government and Principle 139

With regard to Principle 139 of the Constitution, Iran's Government can rely upon two procedures to approve a referral to arbitration: (1) Approvals on sending issues of referral to arbitration (or other dispute settlement methods) to the Parliament to be approved; (2) Approvals on other aspects of Principle 139 which merely concerns the Executive. Each procedure will be discussed in turn.

1. Approvals on sending issues of referral to arbitration to the Parliament to be approved

Over the course of three decades, after the Islamic revolution in Iran, the Government has sent several issues of referral to arbitration to the Parliament. Among these, the most important is the 'Iran - United States Claims Tribunal'. This is discussed later in this chapter.⁶

There have also been other issues which were sent to the Parliament for authorization for referral to dispute settlement systems. Some of the Parliament's authorizations in this regard, are as follows:

- '*Law on Referral of the Former National Company of Grain, Cube Sugar, Sugar and Tea of the National Organization of Grain's Disputes with a West-German Company and a British Company to Arbitration*' (08 June 1981).⁷ According to

⁶ See section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

⁷ Iranian Official Gazette, No.10614, 24-07-1981, for further information see the website at: <http://www.gazette.ir>, last visited on 1-10-2016.

this approval, the Trade Minister and the Chairman of General Assembly of Shareholders in the National Organization of Grain were allowed to refer the disputes concerning the contract to arbitration.

- '*Law on Referral of Disputes between Iranian Company of Manufacturing and Distribution of Electricity Power (TAVANIR) and Czechoslovakian Eshcouda Export Company to Arbitration*' (11 August 1981).⁸ Pursuant to the Article 28 of the contract, the arbitration should be held in Iran (Tehran).⁹

- '*Law on Referral of the G.A.A Company's Dispute with Mellat Bank to Arbitration*' (5 January 1982).¹⁰ According to this approval, the Central Bank of Iran was allowed to refer the disputes of a contract, which was agreed in August 1975, to arbitration.¹¹

- '*Law on Referral of Disputes between Iranian Tractor Manufacturer Company and Milter Zand Monsh (A Transport Company) to Arbitration*'¹² (13 November 1983).¹³

This passage shows that, although the constitutional rules of Principle 139 on the referral of a dispute to dispute settlement has been observed and implemented by the Parliament and the Government of Iran, there are some differences between their practice and understanding those constitutional requirements. The Parliament believes in the case-by-case approval method,

⁸ Iranian Official Gazette, No. 10651, 21-09-1981.

⁹ The Parliament's detailed discussions, 1st period, Session 196, 11-08-1981, Iranian Official Gazette, No. 10794.

¹⁰ Iranian Official Gazette, No. 10778, 23-02-1382.

¹¹ The bill, which was sent by the Government to the Parliament, contained '*and the similar cases*' to include other referrals to arbitration without getting a new approval from the Parliament. But due to the Parliament's interpretation of Principle 139 of the Constitution, before being adopted, it was removed from the bill by the Economy Committee of the Parliament. This referral was to arbitration in Iran (The Parliament's detailed discussions, 1st period, 5-01-1982, Iranian Official Gazette, No. 10749).

¹² This dispute was referred to arbitration in Iran in the legal division of Industrial Development and Renovation Organization of Iran (IDRO). Although this referral was to an Iranian arbitration, the dispute included a foreign party. Therefore, under the Principle 139 of the Constitution it was referred by the Government to the Parliament.

¹³ Iranian Official Gazette, No. 11307, 20-12-1983.

however the Government has implemented a *blanco* approval approach.¹⁴ As the Guardian Council has not given any interpretation with regard to this approach by the Government, which seems to be inconsistent with the wording of Principle 139 of the Constitution, both methods can be taken into account in Iran's accession to the WTO agreements including the DSU on the dispute settlement system.

2. Approvals on other aspects of Principle 139 which merely concerns the Executive

To determine the Government's practice on the enforcement of the Principle 139 requirements, the regulations regarding the settlement of state or public property disputes should also be taken into consideration. In doing so, some examples are presented below.

To be exempted from being subject to the requirements of Principle 139 on the Parliament's approval, if non-Iranians are not a contract party or a party to the dispute, there is no need to request the Parliament's authorization to resolve the dispute. There are some other regulations which were approved by Iran's Government and, even though they concern the disputes that are relevant to '*public and state properties*', they do not include non-Iranians. A few examples of these regulations are as follows:

- '*Regulation of Board of Ministers on permission for Disputes Settlement between C.B.S Technical Companies and Zange Tafrih Company through referral to Arbitration*'¹⁵ (11 October 1987) with regard to contracts: 64-2328, 64-2329, 64-2330, 64-2331 and 64-2332.

- '*Regulation of Board of Ministers on Referral of Alborz Insurance Company's Disputes to Arbitration with regard to the Land Transport Insurance Contracts Numbers: 65-100-3352 to 3366*'¹⁶ (04 August 1989).

¹⁴ Under the *blanco* approval approach, as discussed in chapter 5, section 5.2.1.2. (Legal Issue (2): Case-by-Case Approval Approach or *Blanco* Approval), the Government does not implement the case-by-case approval approach which is stated in Principle 139. In other words, if the agreement including dispute settlement mechanisms is adopted by the Parliament, the referral to dispute settlement in each case will not be requested from the Parliament.

¹⁵ Iranian Official Gazette, No. 575 T-61002.

¹⁶ Iranian Official Gazette, No. 576 T-42550.

- 'Regulation of Board of Ministers on Authorizing the Infrastructural and Industrial Affairs Commission of the Government to approve Referral of Disputes on Public and State Properties to Arbitration'¹⁷ (08 May 1994).

It is worth mentioning that, according to the above-listed regulations, the Government has resorted to a *de facto* interpretation of the Principle 139, which seems to be, to some extent, different from the Parliament's interpretation. The first remarkable point which can be seen in these regulations is that the Government has not followed a 'case-by-case approval approach'. This can be inferred from the regulations in which the Government usually applies a *blanco* approval approach regarding the constitutional requirement in relation to the referral to dispute settlement, which may relate to several (future) disputes at the same time. It is noticeable that, although this approach of the Government can accelerate the settlement of disputes, it does not seem to be consistent with the wording of Principle 139 of the Constitution. In addition, it is doubtful whether a *blanco* approval approach can achieve the objectives intended by the drafters of Principle 139 of the Constitution on the settlement of disputes concerning state and public property.

It may be questioned whether the same procedure (the *blanco* approval approach) could also be used for WTO disputes. If this interpretation had been practically recognized by Iran's legal system, Principle 139 would have not constituted a serious bar for Iran in its accession to the WTO.

Iran can consider all future disputes under the WTO agreements as a whole and present them in a package to the Parliament for approval. However, this cannot be approved in the Parliament because, at the time of accession to the WTO, the subject matter of the disputes is not clear and there are no disputes yet. In addition, if the Parliament approves something as vague as this, it is most likely to be declared void by the Guardian Council due to its inconsistency with the Constitution. Regarding the other relevant agreements and treaties, such as the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America* (13 January 1981), it is assumed that the approvals in

¹⁷ Iranian Official Gazette, No. H-59-T, 32730.

the Parliament were based on considering the case-by-case approach which is stated in Principle 139. Otherwise, the Guardian Council would have rejected them on the grounds that they are inconsistent with the constitutional rules.¹⁸ However, the Government's *blanco* approval approach in the referral of a dispute to dispute settlement is still maintained by the Government, even though the Parliament has criticized it officially. This is discussed in more detail later in this chapter.¹⁹ However, whether it is due to the national interest or other pragmatic concerns,²⁰ sometimes the Guardian Council does not react to the *blanco* approval approach.²¹ This can be due to several reasons, among which could be due to this fact that sometimes the Government's bill which is submitted to the Parliament does not include the full text of the main agreement including referral of dispute to settlement systems.

It bears mentioning that the Government, to save time and to accelerate arriving at agreement in the adoption process, has authorized one of its committees, composed of relevant ministers, to examine the disputes, rather than the full Government taking these decisions, and to approve the referral to dispute settlement.

To conclude, the occasional use of a *blanco* approval approach by Iran's Government in dealing multilateral and bilateral agreements implies that there would be no conflict between the practical implementation of Principle

¹⁸ Why the Guardian Council did not reject the Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America (13 January 1981) is, as it is discussed later in this chapter, that the full text of the Algeria Declarations was not submitted to the Parliament and the Parliament merely decided to authorize the Government to accept the general method of arbitration. It was stated in the Parliament's discussions that referral to arbitration shall be approved on the basis of the case-by-case approval approach and the authorization for each referral shall be requested from the Parliament. That is why the Guardian Council did not reject the mentioned decision of the Parliament.

¹⁹ See section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

²⁰ As discussed in chapter 5, section 5.4.3. (National Interest and the Parliament, Guardian Council and the NEC), the Guardian Council is not supposed to take its decisions on the basis of national interest or pragmatic concerns. This task is referred by the Constitution to the National Expediency Council.

²¹ See chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

139 of Iran's Constitution and the compulsory jurisdiction of the WTO DSS. Therefore, from this perspective of a systemic interpretation, there would not be such a legal impediment to Iran's accession to the WTO. However, as discussed later in this chapter, this governmental approach has been recognized by the Parliament as being inconsistent with the Constitution.

However, a case-by-case approval approach is usually used by the Parliament to implement the requirements of Principle 139. This practice of the Parliament can result in a legal impediment to Iran's accession to the WTO.

To know about the implementation of Principle 139 by Iran in its international disputes, the implementation of the mentioned Principle in international trade arbitrations is also discussed below.

6.3. Principle 139 of Iran's Constitution in International Arbitrations

For a better understanding of the legal conflict (between the WTO DSS and Iran's Constitution), the rule including this conflict (Principle 139) was discussed on the basis of several legal interpretations.²² It is also worth considering whether or not this rule including Iran's dispute settlement requirements has been recognized and enforced by international arbitrations. In other words, after studying the domestic legal interpretations such as the ones which have been important in the formation and enforcement of Principle 139 inside Iran, the international aspect of this rule should be taken into consideration. Therefore, a short review of the relevant jurisprudence formed in international commercial and investment arbitrations can be helpful.

To find out whether the requirements of Principle 139 have been recognized and enforced by international tribunals, some arbitration cases in which Iran's restrictions on dispute settlement have been discussed are introduced below.

It bears mentioning that international arbitrations may concern disputes between private parties (commercial law arbitration) as well as disputes between a government and a foreign (private) investor (international

²² See chapter five on legal interpretations of Principle 139.

investment arbitration). A few international agreements set out rules and procedures to facilitate the arbitration process and award enforcement.²³

An examination of the level of recognition and enforcement of Principle 139 in international arbitrations not only gives a better understanding of the international nature of requirements set out in Principle 139, but it can also be helpful in Iran's WTO accession and post-accession processes. In the accession process, Iran needs to achieve a consensus among the WTO Members with regard to its constitutional rules and restrictions. This, as a solution will be discussed in chapter seven. And in the post-accession process, the experience of how other arbitration tribunal awards lacking the required Parliament's authorization (such as the Iran-United States Claims Tribunal awards) have been enforced would be helpful for similar issues regarding the WTO DSS rulings to be recognized and enforced inside Iran.

In addition, it was discussed in the previous sections that, in the implementation of Principle 139 of Iran's Constitution, the Parliament has followed a case-by-case approval approach which is consistent with the legal interpretations issued by the Guardian Council on this Principle.²⁴ However, Iran's Government sometimes follows a *blanco* approval approach. There are also two further points which can support the view that there is no conflict between Iran's Constitution and the compulsory jurisdiction of WTO DSS. The first view is taken from the practice of Principle 139 in general in international disputes and the other one is what has been practiced by a specific arbitration tribunal. These two practices are presented below as: International Arbitrations (1) and Iran-United States Claims Tribunal and Principle 139 Requirements (2).

6.3.1. International Arbitrations

The requirements stipulated in Principle 139 of Iran's Constitution are referred to as domestic law restrictions that are based on 'public policy'.

²³ Conventions such as the Washington (ICSID) Convention (which is a treaty ratified by 153 Contracting States and entered into force on October 14, 1966. Iran has not joined this Convention yet.) And the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (which was adopted on 10 June 1958 and entered into force on 7 June 1959. Iran joined this Convention on 15 October 2001).

²⁴ See section 5.3.3. Authentic Interpretation".

These restrictions, which were contained in the domestic law of a number of countries²⁵ in the past, decreased due to the fact that some international arbitral awards did not value them at the international level.²⁶

The nature of such national prohibitions and restrictions is controversial. Some authors consider that it can diminish or undermine the state's 'capacity'.²⁷ Others describe the nature of such national prohibitions and restrictions as 'arbitrability'.²⁸ The proponents of the 'capacity-restriction view' believe that these restrictions are an issue of the 'capacity of a state to enter into an arbitration agreement and since the issue of capacity of a party is usually governed by the law applicable to it, it follows that the law of the state party determines its capacity'.²⁹ They argue that these domestic restriction rules relate to the power and the right of the state and its public entities to conclude binding contracts. Therefore, such rules fall within the classic definitions of legal capacity.³⁰ This argument is also supported by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).³¹ Article V(1)(a) which provides that the recognition and enforcement

²⁵ For example, see France's Article 2060-1 of the *Code Civil* (law reform of July 5th, 1972). See K. Youssef, "The Death of Inarbitrability," in Loukas Mistelis and Stavros Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), p. 58.

²⁶ Tunisian, Algerian, Egyptian, Lebanese, Saudi Arabian laws which included some restrictions on international arbitration were amended to be consistent with the international legal order, See Youssef (2009), pp. 62-63.

²⁷ Blanc, op. cit., 236-237; Mustill and Boyd (2001), p. 72; See Lalive, Poudret and Reymond, p.3 11 para. 10 ad PILS, Art. 177, and Reymond, op. cit., p. 529.

²⁸ P. Fouchard and B. Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), p. 457.

²⁹ Lew, Mistelis, and Kröll (2003), p. 735.

³⁰ Based on the law of contract, legal capacity is defined as: 'No one can be bound by contract who does not have legal capacity to incur at least voidable contractual duties, and the capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.' This definition is taken from: E. Peel, and G.H. Treitel, *The Law of Contract* (Sweet & Maxwell, 2007), p. 62.

³¹ The New York Convention entered into force on 7 June 1959, for further information see:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html,
last visited on 10-3-2017.

of an award may be refused if the parties or one of the parties 'were, under the law applicable to them, under some incapacity'.³²

By contrast to the above, another group of scholars argues that the domestic restrictions should be viewed to constitute an arbitrability issue. Arbitrability is divided into 'subjective arbitrability' and 'objective arbitrability'³³ and the mentioned restrictions are considered to be part of 'subjective arbitrability'. Subjective arbitrability is defined below:

Whether, under an applicable law, a particular entity - typically a State or other public body - may be a party to an arbitration agreement and thus whether a dispute to which such entity is a party may be submitted to arbitration is referred to by commentators as 'subjective arbitrability' (or arbitrability *ratione personae*).³⁴

Today, however, based on the universal arbitrability theory, there is a tendency in international arbitration not to accept the aforementioned restrictions. Therefore, all international disputes of an economic nature are assumed to be arbitrable and arbitrability is rarely an issue in international dispute settlements.³⁵

It should be noticed that the issue of subjective arbitrability is governed by a substantive rule of international arbitration and not by the law of the state party.³⁶ It is claimed by a number of authors/arbitrators³⁷ that restrictions like those that are contained in Principle 139 of Iran's Constitution are diminished by the emergence of a norm of 'international public policy' which was created and developed through a few arbitration awards like Arbitration Award No.

³² Poudret and Besson (2007), p. 183.

³³ Objective arbitrability is defined as: 'Whether, under an applicable law, the particular subject matter of a dispute is capable of resolution by arbitration, in the light of relevant public policy considerations is referred to by commentators as 'objective arbitrability' (or arbitrability *ratione materiae*)'. For further information see: LY Fortier, "Arbitrability of Disputes," *Global Reflections on International Law, Commerce and Dispute Resolution: liber amicorum in honour of Robert Briner* (ICC Publishing, 2005), p. 270.

³⁴ Fortier (2005), pp. 269-270.

³⁵ Youssef (2009), p. 55.

³⁶ For more information see: Lew, Mistelis, and Kröll (2003), p. 737.

³⁷ Some relevant views and awards are discussed in this chapter.

4381 of 1986 (regarding a contract between An Iranian public company and a French company).³⁸ This theory was also supported by the Institute of International Law through a resolution. The Institute of International Law proclaimed in its resolution of 1988 that:

A state, state-owned company or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed.³⁹

It is important to notice that Iran's Constitution is part of its domestic law and, if Iran's Government has not achieved the approval of Iran's Parliament to refer a dispute to arbitration, it lacks the capacity. However, this resolution states that invoking this incapacity by Iran is not accepted due to an international public policy consideration in international arbitrations.

Before discussing the so-called 'international public policy' norm, it should be mentioned that the requirements of Principle 139 of Iran's Constitution have been discussed in several international arbitration awards, some of which are presented below.

- Arbitration Award No. 3896 of 30 April 1982 on the *Framatome v. Atomic Energy Organization of Iran (AEOI)*⁴⁰

In 1974, a contract was concluded between the *Atomic Energy Organization of Iran (AEOI)* and a French Company *Framatome* on constructing nuclear power plant units, which was stopped later in 1979 after the Islamic revolution in Iran. As a dispute was raised, pursuant to the arbitration clause of the contract, the issue was referred to arbitration by the French company.

Although the applicable law chosen by the parties was Iranian law, the tribunal referred on several occasions to general principles of law 'found enshrined in particular in international trade usages and international law.' In that case, those principles were in fact also found in Iranian law, but the arbitrators nevertheless underlined that they did

³⁸ Arbitration award No. 4381 is discussed further below.

³⁹ Bucher, p. 42 para. 101; Delaume, op, cit., p. 26; Raeine, p. 217 para. 377; Schwebel, pp. 61-72.

⁴⁰ Award on jurisdiction of April 30, 1982 in ICC Case No. 3896, *Framatome S.A. v. Atomic Energy Organization of Iran (AEOI)*, 111 J.D.I. 58 (1984).

not consider themselves to be strictly limited to applying the law chosen by parties.⁴¹

Although the contract was concluded before the Islamic revolution in Iran and the new Constitution was approved after that revolution, the Iranian party claimed that, as the parties had agreed before, 'Iranian law' would govern the contract and, since it referred to the term of 'living law' in the contract, therefore, the new Constitution of Iran would also govern the contract. The arbitration tribunal rejected this argument by invoking the principle of non-retroactivity. It is worth mentioning here that this argument of the arbitrators is criticized by some authors⁴² as being in conflict with the interpretation of Principle 139 of Iran's Constitution issued by the Iran's Guardian Council.⁴³ Despite such observations, it appears that domestic restrictions were not recognized by the arbitrators.

The Iranian company questioned the 'capacity' of the Iranian party with regard to this contract, which could result in the invalidity of the entire contract. This claim was rejected based on the fact that the capacity had been '*exercised with the full approval and on the instructions of the Iranian Government.*'⁴⁴

The Iranian party also invoked Principle 139 of Iran's Constitution to void the arbitration agreement. By referring to a so-called 'general principle', the arbitration tribunal finally rejected this argument and held that:

A general principle exists which is now universally recognized in relationships between states as well as in international relations between private entities (whether the principle be considered a rule of international public policy, an international trade usage, or a principle recognized by public international law, international arbitration law or 'lex mercatoria'), whereby the Iranian state would in any event – even if

⁴¹ Fouchard and Goldman (1999), p. 845.

⁴² For instance, see Abedi (2007), p. 119.

⁴³ Based on this interpretation, Principle 139 of Iran's Constitution governs all contracts whether concluded before or after the Islamic revolution. For more information, see *ibid.*

⁴⁴ J. Lew, *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers, 2013), pp. 292-93.

it had intended to do so, which is not the case – be prohibited from renegotiating on an arbitration agreement entered into by itself or, previously, by a public entity such as AEOI.⁴⁵

It is notable that the term 'a rule of international public policy' used in this Arbitration Award is assumed to be taken as just describing a general rule in contract law (the principle of *pacta sunt servanda*). Therefore, it is doubtful to be the same as what is meant by that term in Arbitration Award No. 4381 which is discussed below. In other words, the arbitrators wanted to emphasize that, as the parties to the contract had accepted and approved something in the past, they could not reject or deny all or part of it later.

- Arbitration Award No. 4381 of 1986 involved an Iranian State Company and a French Company.⁴⁶ An Iranian public company and a French company concluded a cooperation agreement for work to be carried out in Iran. After they completed this project, the parties decided to continue their cooperation and have a new project. They began the work without being able to agree on the text of a new agreement and later a dispute arose between them. In 1982, the French company decided to refer the dispute to arbitration on the basis of the arbitration clause contained in the joint venture agreement. This arbitration, composed of three arbitrators, was convened in Stockholm.

The Iranian party argued that it was not bound by the arbitration agreement it had entered into since the 'formalities' required by the Iran's Constitution were not observed. The arbitral tribunal held that:

The international public order strongly prohibits a state entity dealing with foreigners to enter openly and knowingly into an arbitration agreement upon which the foreign party relies, and thereafter attempt to invalidate the arbitral agreement based on the invalidity of its own promise under its own law.⁴⁷

⁴⁵ Fouchard and Goldman (1999), pp. 327-328.

⁴⁶ ICC award No. 3481 of 1986, 1986-1990 Collection al' ICC awards 263.

⁴⁷ The 1997 Iranian International Commercial Arbitration Law: H.G. Gharavi, "The UNCITRAL Model Law", *International Arbitration* (1999) 15. p. 85.

As stated in the award, and as has been noticed by other arbitrators and authors, this award was issued based on an 'international public order'. This award is taken as one of the most important awards that has been issued, since by referring to an 'international public order' it did not recognize any domestic law restrictions. Henceforward, almost all arbitrators, by invoking the 'international public order' stated in Arbitration Award no. 4381, rejected any kind of claim based on domestic restrictions and this formed a new international arbitral practice in international arbitration. Nevertheless, a number of jurists have described this 'international public order' as what had existed before the aforementioned Arbitration Award. For instance, Yves Derains, 'a well-known commentator', in his commentary to this award says:

What is recognized by international arbitration practice as a violation of public policy, is the fact for a State or legal entity of public law to conclude an arbitration agreement without revealing its capacity or lack of authority and then later to invoke such lack of authority in order not to respect the agreement.⁴⁸

In other words, the arbitrators in this Arbitration Award rejected Iran's claim based on invoking the 'formalities' of the Principle 139 of the Constitution because the Iranian party had not informed the other party about these formalities and restrictions when concluding the contract. Therefore, the Iranian party's argument was not accepted by the arbitrators because it was considered to be in conflict with the principle of 'good faith'. This understanding of the 'international public order' is also recognized in various paragraphs of Arbitration Award no. 4381, as presented below:

Moreover, note that the sentence relates the good faith of the applicant to his ignorance of the defect in the arbitration agreement as to the fact that it was not informed of the specific requirements of the Iranian law.⁴⁹

⁴⁸ Arbitral Award Case No. 6474, 1992, J.J. Arnaldez, Y. Derains, and D. Hascher, *Collection of ICC Arbitral Awards, 1996-2000* (Kluwer Law International, 2003), p. 362.

⁴⁹ Taken from an informal English translation of the French text of Arbitration Award No. 4381.

Therefore, there is no doubt that, if parties to a contract or a treaty are reasonably informed of the restrictions of domestic law of a party in its conclusion, the restrictions cannot be rejected later. This, I assume, also includes the accession of a country like Iran to bilateral and multilateral treaties, providing that Iran informs the members about its domestic law restrictions when acceding to those treaties.

What is worth considering here is the conclusion that the arbitrators made based on this 'international public order'. They rejected the claim of incapacity by the Iranian public party based on an understanding of the principle of 'good faith'. This understanding gave rise to a concept of 'international public order' which became the basis of rejecting domestic law restrictions in international arbitrations as an international arbitral practice. This international practice has been criticized by a number of jurists. This criticism on whether the mentioned international practice is based on a legal analysis forming a reliable practice in international arbitrations is worth considering. Some of the criticism is as follows:

I. The 'International Public order' based on arbitral precedent

It was stated in Arbitration Award no. 4381 that the award was issued based on arbitral precedents.⁵⁰ This is also considered by some authors such as Derains (1986) in his comments on this Arbitration Award where he says:

The reasons given by the arbitrators in this matter are fundamentally based on arbitral precedents, a summary of which have been published.⁵¹

It is questionable whether the arbitral precedents are of a binding and compulsory nature. It is recognized by the international arbitration experts that the arbitral precedents can just have persuasive value in relation to other arbitrations.⁵² Therefore, it is doubted whether an arbitration award can just be issued based on arbitral precedents while they are not otherwise binding.

⁵⁰ M. Rubino-Sammartano, *International Arbitration Law and Practice*, Second ed. (Kluwer Law International, 2001), p. 79.

⁵¹ Arnaldez, Derains, and Hascher (2003), p. 362.

⁵² Rubino-Sammartano (2001), p. 78.

And, more interestingly, this award became the basis of an international practice which is recognized by other international arbitrators.

II. There was no consensus supporting the views echoed in the award

Some authors have claimed that Arbitration Award no. 4381 is confirmed by consensus in international arbitration. Among those authors is Rubino-Sammartano. Although he mentioned this consensus, he admitted that there were also some other authors who objected to this understanding that the domestic restrictive laws are inconsistent with the 'International Public order'. He says:

While some objections have been made to this principle, one must recognize that it has obtained a large consensus.⁵³

Supporters of this consensus claim that the rule prohibiting state and public entities from relying on the restrictions of their domestic law in international arbitrations constitutes a general principle of international arbitration. Yet, there are other authors that are of a different opinion. For example, the authors of Poudret, et al (2007) say that:

In our opinion, this rule is too absolute, and as we have just seen, it has not been adopted by English, Italian and Belgian law.⁵⁴

It is worth considering that the above-mentioned countries' practices are examined outside the WTO framework and, in fact, before its establishment, to show that there was no consensus at that time regarding the so-called 'international order'.

Opponents of the mentioned consensus, including this author, believe that the restrictive provisions of national laws have been rejected by a number of courts and arbitrators because of other problems. These problems, including the inconsistencies with the principle of 'good faith', etc., are something different from the rule that evolved based on 'international public order' to prohibit any reliance on domestic restrictions in international arbitrations. Further, resolution 1988 of the Institute of International Law on supporting

⁵³ Rubino-Sammartano (2001), p. 141.

⁵⁴ Poudret and Besson (2007), p. 192.

the absolute prohibition of domestic restrictions, which was mentioned above, has been criticized by a number of jurists. It is argued that this view of the Institute is not consistent with Article V (1)(a)⁵⁵ of the *New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards)* 1958.⁵⁶ They believe that using the principle of 'good faith' cannot be in all cases adequate to overrule domestic laws restricting state and public companies from referring a dispute to arbitration.⁵⁷ Another criticism concerning this prohibition is that the domestic restrictions cannot be accepted if the state and public entities were 'incapable of validly waiving'⁵⁸ the restrictive provisions of their domestic law. In other words, the domestic restrictions are made by a parliament or even a higher organ, the Constitution in the case of Iran, and, therefore, for instance the government is not capable of waiving them at all and, if they did not observe the requirements under those restrictions in concluding a contract, the contract would contain a defect from the view of that country's legal system,⁵⁹ even though the competent organ (for example a parliament) can fix this problem.

Another important point regarding Arbitration Award no. 4381 is that, even though there was a clear arbitration clause between two parties and it was not difficult to find the applicable law, and also that there are rules of private

⁵⁵ Article V(1)(a) of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) 1958: 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article 11 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'. For further information, see: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf, last visited on 1-10-2016.

⁵⁶ See the New York Convention of 1958 (on the Recognition and Enforcement of Foreign Arbitral Awards). This convention was adopted on 10 June 1958 and entered into force on 7 June 1959. It has 142 parties. For further information, see: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf, last visited on 1-10-2016.

⁵⁷ Poudret and Besson (2007), p. 193.

⁵⁸ Ibid.

⁵⁹ Ibid.

international law which could be used to establish the applicable law, the Arbitral Tribunal in Arbitration Award no. 4381 believed that:

It had the authority to choose the legal sources governing the determination of the validity of the arbitration agreement without need to establish the applicable private international law.⁶⁰

It is assumed here that the arbitrators believed that the claim of the responding party on incapacity should not be recognized and that this was why they avoided any rule which could lead to the Iranian law being applicable in this arbitration, and, finally, they invoked an 'international public order' justification as the basis of their award which became, as mentioned above, the cornerstone of an international practice in international arbitrations.

Now, it is more understandable why 'arbitrability' has been given more consideration than 'capacity' by some international arbitrators in examining the nature of domestic law restrictions. This is due to the fact that, based on the 'universal arbitrability' consideration, no domestic restriction is accepted in international arbitrations.

The trend in favour of arbitrability has recently taken a new dimension, with the inception of what can be termed 'universal arbitrability'. Put simply, this means that arbitrability today is rarely an issue. All international disputes of an economic nature are *prima facie* arbitrable in most jurisdictions, and it would be hard to find a dispute arising out of the operation of global commerce that is not.⁶¹

It can be argued that, because Iran's Principle 139 has been discussed by jurists in a number of cases in international arbitrations, it cannot be claimed that the restrictions in the Constitution of Iran concerning the settlement of international disputes are unknown anymore. Therefore, it does not seem very reliable if, in concluding a contract or a treaty, the Iranian party does not emphasize its restrictions and later, when a dispute is raised, the other party

⁶⁰ L'Académie de Droit International de la Haye, *Recueil des cours Collected Courses of The Hague Academy of International Law (Recueil des Cours, Collected Courses, Tome)*, vol. 289 (Hachette, 2001), p. 57.

⁶¹ See Youssef (2009), p. 55.

can reject the legal consequences of the restrictions due to the principle of good faith.⁶² Furthermore, as mentioned before, due to being part of constitutional rules, the Iranian party cannot even waive these restrictions, either in concluding a contract or when a dispute is raised. Indeed, a (state owned) company or the Iran's Government does not have the legal capacity to waive the requirements requested by the Constitution with regard to state and public property.

Assuming a domestic law restriction is not known among the countries and legal experts, it is argued that it must be considered what kind of legal consequences an arbitration award based on an incapacity could have in the domestic legal system of Iran. In other words, where there is no capacity to conclude a contract or to refer a dispute related to state and public property to arbitration, can the legal consequences as to the result of a dispute be recognized by the domestic legal system of Iran?

Furthermore, there are some instances in international trade law which can show that under some circumstances a country can invoke its public policy justification, including public interest and security with regard to restricting the extent of its commitment based on, for example, multilateral agreements of the WTO. A case referred to the WTO dispute settlement system, the '*Helms-Burton Act*',⁶³ shows how the United States did not participate in the WTO dispute settlement system consultations concerning the *Helms-Burton Act* and did not respond to the request of the claimant on the basis of its public interest and security.⁶⁴

To conclude, the practice in relation to Principle 139 of Iran's Constitution at the international level reveals a reluctance of some international arbitrations

⁶² Iran's domestic law restrictions, including the requirements of Principle 139 were not recognized by Iran-United States Claims Tribunal because of the principle of good faith. For further information, see the dissenting opinion of Shafie Shafiei in claims: Philips Petroleum Company and AMOCO Iran Oil Co v The Islamic Republic of Iran, The Dissenting Opinion of Shafie Shafiei in Philips Petroleum Company and Iran; and Amoco Iran Oil Company and Iran, Interlocutory Awards Nos. 11-39-2 and 12-55-2, reprinted in 3 Iran-U.S. CTR 297, 305-308.

⁶³ Act of 1996, 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997).

⁶⁴ See WTO Doc. WT/DS38/5 (United States - The Cuban Liberty and Democratic Solidarity Act), 1998.

to recognize Iran's domestic restrictions in the settlement of international disputes. This supports the view that there is no conflict between Iran's constitutional requirements and the compulsory jurisdiction of the WTO DSS. On the basis of this view, it can be asserted that there would not be any legal impediment resulting from Principle 139 to Iran's accession to the WTO.

Another point which supports the no conflict view is taken from the practice in relation to Principle 139 by Iran's Government with regard to the Iran-United States Claims Tribunal, which is presented below.

6.3.2. Iran-United States Claims Tribunal and Principle 139 Requirements

One of the important reasons to support the no-conflict view regarding Iran's WTO accession is based on the Government's *blanco* approval approach in referring state and public property disputes to the Iran-United States Claims Tribunal. How this *blanco* approval approach was established in the Tribunal and whether it can be the legal basis to support the no conflict view is discussed below. It bears mentioning that if the no conflict view can be legally supported by what has been practiced by Iran in the Tribunal, it can be asserted that there is no legal impediment to Iran's WTO accession. Therefore, the Tribunal is examined closely.

After Iran's revolution in 1979, the political relationship between Iran and the United States collapsed. This crisis worsened when the United States brought a dispute to the International Court of Justice and several lawsuits were brought before the domestic courts of the two countries by their nationals against the two governments. The dispute against Iran in the ICJ was regarding the United States Diplomatic and Consular Staff in Tehran. On 4 November 1979 a group of students entered the US Embassy in Tehran and seized a number of US Embassy personnel and documents. While 13 hostages were released on 18 and 20 November, 52 diplomatic agents or members of the administrative and technical staff remained in captivity. The student group holding the Embassy asserted that the remaining hostages were guilty of espionage and would be tried for their crimes if their demands were not

met.⁶⁵ The student group demanded the extradition of *Shah* (Iran's king who had fled to the US because of Iran's 1979 revolution),⁶⁶ the return of the Iran's assets –including *shah's* and his family assets – to Iran,⁶⁷ and finally the non-interference of the US government in Iran's political affairs.⁶⁸

In response, the US President Jimmy Carter issued Executive Order No 12170 of 14 November 1979,⁶⁹ freezing assets and properties belonging to Iran, its organizations and entities in the United States or under the control of its nationals or bankers throughout the world.⁷⁰ Over \$12 billion worth of Iran's assets were seized.⁷¹ The United States military attempt, on 24 April 1980, to release its diplomats in Iran, which was called '*Operation Eagle Claw*', was not successful.⁷²

In 1979, the United Nations Security Council issued two resolutions, 457⁷³ and 461,⁷⁴ to convince Iran to release the diplomats. However, the third

⁶⁵ Application Instituting Proceedings submitted by the Government of the United States of America to ICJ, p. 3. For the full text see:

<http://www.icj-cij.org/docket/files/64/9545.pdf>, last visited on 1-10-2016.

⁶⁶ Documents Submitted to the Court after the Filing of the Request for the Indication of Provisional measures, Student Statement No. 37, p. 88.

<http://www.icj-cij.org/docket/files/64/13070.pdf>, last visited on 1-10-2016.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ For the full text see: <http://www.archives.gov/federal-register/codification/executive-order/12170.html>, last visited on 1-10-2016.

⁷⁰ N.L. Wallace-Bruce, *The Settlement of International Disputes: The Contribution of Australia and New Zealand*, Legal Aspects of International Organization (Martinus Nijhoff Publishers, 1998), p. 75.

⁷¹ Wallace-Bruce (1998), *ibid*.

⁷² For further information see: RA Radvanyi, MC Command, and S College, "Operation Eagle Claw: Lessons Learned," (Marine Corps Command and Staff College, 2000), available at: <https://books.google.nl/books?id=vufpHAAACAAJ>, last visited on 1-10-2016.

⁷³ For the full text of the resolution see: <http://www.un.org/Docs/scres/1979/scres79.htm>, last visited on 1-10-2016.

⁷⁴ For the full text of the resolution, *ibid*.

resolution draft of 10 January 1980 to sanction Iran was vetoed by the Soviet Union.⁷⁵

The ICJ issued its judgment on 24 May 1980 concerning United States Diplomatic and Consular Staff in Tehran which stated that Iran had violated its obligations under international law (1); that resulted in Iran's responsibility (2); *'Iran must immediately release the United States nationals held as hostages and place the premises of the Embassy in the hands of the protecting power'* (3); none of American diplomats should be kept in Iran for judicial proceedings (4); Iran has an obligation to make reparation for the US injuries (5); and the form, and in case of the agreement failing between the parties regarding the amount of the mentioned reparation, it should be settled by the Court (6).⁷⁶

On 27 July 1980 the *Shah*, whose extradition was among the main requests of the Iranian student group, after leaving the United States, died in Egypt. On 12 September 1980, Iran's Leader referred the final decision on the hostage crisis to the Parliament.⁷⁷ Accordingly, a special committee was formed in the Parliament and, after discussions, it issued its report on 2 November 1980. This report included four conditions to release the hostages and was adopted by the Parliament on the same day as a declaration. The four conditions demanded: the non-intervention of the US in Iran's affairs (1); the release of Iran's assets which were frozen by the US and also the removal of trade sanctions against Iran (2); the annulment of private claims in the US against Iran (3); and the return of the assets of *Shah* and his family to Iran.⁷⁸ On the basis of the declared conditions, indirect negotiations were initiated between Iran and the US through the mediation of Algeria. Finally, two unilateral declarations, as well as a document named: *'Undertakings'* including commitments of US and Iran, were announced by Algeria on 19 January 1981: The *'General Declaration'* and the *'Claims Settlement Declaration'*. Iran and United States separately adhered to these declarations. Through these

⁷⁵ A. Maroussi and M. H. Zahedin Labaf, *Iran-U.S. Claims Tribunal Arbitration Awards Reports* [گزارش آرای دیوان داورى دعاوى ایران - ایالات متحده], vol. 1, (Center for International Legal Affairs, 2011), p. 15.

⁷⁶ For the full text of the judgment see: <http://www.icj-cij.org/docket/files/64/6291.pdf>, last visited on 1-10-2016.

⁷⁷ M. Mohebi, *The International Law Character of the Iran-United States Claims Tribunal*, Developments in International Law, (Springer Netherlands, 1999), p. 60.

⁷⁸ *Ibid*, p. 61.

documents, known as the *Algiers Declarations* or *Algiers Accords*, the US accepted Iran's declared conditions and Iran accepted to release the 52 American diplomats.⁷⁹ And under Section 11 of the *General Declaration*, United States also accepted to withdraw its claim before the ICJ against Iran on the issue of the American diplomats.⁸⁰

It bears mentioning that, after Iran's 1979 revolution until the establishment of the above-mentioned declarations, 2,150 cases⁸¹ (approximately worth \$3 billion) had been filed in US courts against Iran's Government or Iran's state-owned entities.⁸² To resolve this legal issue, it is stated in Section B of General Principles of the *General Declaration* that:

It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United

⁷⁹ Mohebi (1999), p. 62.

⁸⁰ Section 11 of the *General Declaration* states: 'Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.', see <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>, last visited on 1-10-2016.

⁸¹ For further information see: A.J. Colucci, "Dames & Moore v. Regan: The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion", *Catholic University Law Review* (1982) 31, p. 567.

⁸² Mohebi (1999), p. 67.

States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.⁸³

To achieve the above-mentioned purpose, the Iran-United States Claims Tribunal was established through the second Algiers Declaration. Under *Claims Settlement Declaration* the Iran-United States Claims Tribunal has jurisdiction over:

- claims of nationals of the United States against Iran and certain related counterclaims⁸⁴ (Article II(1) of *Claims Declaration*) (claims of nationals);
- claims of nationals of Iran against the United States and certain related counterclaims (Article II(1) of *Claims Declaration*) (claims of nationals);
- contractual claims between the two Governments (Article II(2) of *Claims Declaration*) (official claims);
- disputes as to the interpretation or performance of any provision of the *General Declaration* (Article II(3) of *Claims Declaration*) and *Claims Settlement Declaration* (Article VI(4) of *Claims Declaration*) (interpretive disputes);

⁸³ For the full text of the *General Declaration* see the website of Iran-US Claims Tribunal at:
<http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>, last visited on 1-10-2016.

⁸⁴ Article II (2) states that 'any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.', for the full text of the declaration see:
<http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf>, last visited on 1-10-2016.

- any disputes regarding bank claims (the Undertakings)

Article I of the *Claims Declaration* states:

Any such claims not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement.⁸⁵

The time period was extended twice, each time for three months. Within this time period, 6,000 cases were filed in the Tribunal worth an amount of more than \$65 billion.⁸⁶

The Claims Tribunal, which was established on 19 January 1981 in The Hague,⁸⁷ has finalized so far over 3,900 cases.⁸⁸ The Tribunal is composed of nine arbitrators, three appointed by Iran, three by the United States and the remaining three from third states are selected through mutual agreement of the six arbitrators from Iran and the US.⁸⁹ If not agreed within 30 days after the appointment of the six arbitrators, the *Secretary General of the Permanent Court of Arbitration* will appoint the remaining three arbitrators.⁹⁰ One of the three arbitrators should be appointed as the President of the Tribunal.⁹¹ Except for the first round, the three final arbitrators have been appointed by the *Secretary General of the Permanent Court of Arbitration*.⁹²

Claims can be decided by the Full Tribunal (nine arbitrators) or by a Chamber of three Members as the President determines.⁹³ The President of the Tribunal can also transfer cases from one Chamber to another. A Chamber can relinquish jurisdiction to the full Tribunal in any case where an important issue is raised or where the resolution of an issue can result in inconsistent

⁸⁵ Article I of Claims Declaration.

⁸⁶ Mohebi (1999), p. 67.

⁸⁷ Article VI of the Claims Declaration states: 'The seat of the Tribunal shall be The Hague, The Netherlands or any other place agreed by Iran and the United States.'

⁸⁸ For further information, see the website of the Tribunal at: <http://www.iusct.net>, last visited on 1-10-2016.

⁸⁹ Article III (1) of the *Claims Declaration*.

⁹⁰ Article 6 (2) of the Tribunal Rules of Procedure (3 May 1983).

⁹¹ Article III (1) of the *Claims Declaration*.

⁹² Maroussi and Zahedin Labaf (2011), p. 39.

⁹³ Article III (1) of the *Claims Declaration*.

decisions. A Chamber is obligated to relinquish jurisdiction only if it could not find a majority for a decision.⁹⁴ Cases are distributed to Chambers by lot.⁹⁵

Under Article III (2) of the *Claims Declaration*, Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the *United Nations Commission on International Trade Law*⁹⁶ (UNCITRAL).⁹⁷ The *Tribunal Rules of Procedure* (3 May 1983) are formed on the basis of the UNCITRAL rules and some modifications which were made within the framework of the *Algiers Declarations* and specifically pursuant to Article III (2) of the *Claims Declaration*.⁹⁸

Regarding the applicable law, Article V of the *Claims Declaration* states: '*The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.*'

Awards or decisions shall be taken by a majority,⁹⁹ which are final and binding,¹⁰⁰ and the parties shall carry out the award without delay.¹⁰¹ Under Article 32(1) of the *Claims Tribunal*, in addition to final award, the Tribunal can make interim, interlocutory, or partial awards.

The disputes can also be resolved through the mutually agreed solution mechanism. Under Article 34 (1) of the *Tribunal Rules of Procedure*, before the award is made, if the parties agree on a settlement of the dispute, the Tribunal

⁹⁴ G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford University Press, 1996), p. 10.

⁹⁵ Section 6 of Notes to Article 2 of the *Tribunal Rules of Procedure* states: 'Upon filing a Statement of Claim, the Registrar shall assign an identifying number to the claim, and the case shall be assigned to the Full Tribunal or by lot to a Chamber.'

⁹⁶ UNCITRAL which are the subject of Resolution 31/98 adopted by the General Assembly of the United Nations on 15 December 1976, Introduction and the Definitions of the *Tribunal Rules of Procedure*.

⁹⁷ Article III (2) of the *Claims Declaration*.

⁹⁸ Section 1 of the Introduction and the Definitions of the *Tribunal Rules of Procedure*.

⁹⁹ Article 31(1) of the *Tribunal Rules of Procedure*.

¹⁰⁰ Article IV(1) of the *Claims Declaration*.

¹⁰¹ Article 32 (1) of the *Tribunal Rules of Procedure*.

shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the Tribunal, record the settlement in the form of an arbitral award on agreed terms. This is, I think, to enable the parties to get access to the enforcement mechanisms (discussed below) that are covered by the Declarations and partly enforced by the Tribunal.

The Iran-United States Claims Tribunal is defined by Michael Akehurst as the most important tribunal in the history of international law. He has stated three factors to support his description:¹⁰²

- the large number of cases before the Tribunal (more than 3,800 cases were filed);
- the financial amounts involved (total value the vicinity of US\$50 billion);
- the wide range of issues of public law and international commercial law addressed in the decisions.

Wallace-Bruce has also referred to the Tribunal as an international arbitral tribunal which has been responsible for a number of firsts. He says:

The Tribunal has made important contributions to the law of international arbitration. It has already achieved a number of 'firsts'. It has been operating since 1981, making it perhaps the longest running international arbitral tribunal in history. It has a huge caseload, believed to eclipse that of any previous tribunal... The Tribunal has already generated a wealth of case law, making significant contributions to the development of international law in areas such as nationalizations and dual nationality.¹⁰³

The awards and decisions of the Tribunal, which have been published since 1983 as: *Iran-United States Claims Tribunal Reports*, have played a very important role in the development of public international law, international commercial law and international arbitrations. For instance, as Wallace-Bruce says, the Tribunal has displayed the adaptability of the UNCITRAL rules as suitable for not only single commercial disputes before *ad hoc* arbitrations, but also an arbitration involving a large caseload and operating on an almost

¹⁰² P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Revised ed. (Taylor & Francis, 2002), p. 296.

¹⁰³ Wallace-Bruce (1998), p. 80.

institutional basis.¹⁰⁴ Also David Jones (1985) has analyzed the Tribunal's nature as '*a tribunal that is seized of jurisdiction in disputes that are private law disputes transferred to a transnational arbitral tribunal.*'¹⁰⁵ That is why David D. Caron (1990) has referred to the Tribunal's awards as '*a gold mine of information for perceptive lawyers.*'¹⁰⁶

One of the important innovative characters of the Tribunal, which has been addressed as an unprecedented mechanism,¹⁰⁷ is the *Security Account*.

The Security Account is not a lump sum amount as it is usual in lump sum settlement of disputes in which a define sum of amount is determined. The Security Account is, actually, a current account without any limitation. Unless all claims are settled and the President of the Tribunal certifies '*to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied*'.¹⁰⁸

There are also some other differences between the Security Account and a lump sum which, due to the limited scope of this chapter, are not discussed.¹⁰⁹

As mentioned above, all decisions and awards of the Tribunal are final and binding. To enforce the decisions and awards, there are two enforcement mechanisms: Security Account and enforcement through domestic courts.

Under Paragraph 7 of the *General Declaration*, Iran accepted a unilateral commitment to deposit U.S. \$1 billion in a Security Account in the name of the Algerian Central Bank at the disposal of the Tribunal '*for the sole purpose of securing the payment of, and paying, claims against Iran*'.¹¹⁰ And, if the balance

¹⁰⁴ Malanczuk(1998), pp. 80-81.

¹⁰⁵ D.L. Jones, "The Iran United States Claims Tribunal: Private Rights and State Responsibility", 24 *Virgin-ia Journal of International Law-Lillich* (1984), p. 56.

¹⁰⁶ D.D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", *The American Journal of International Law* (1990) 84, p. 104.

¹⁰⁷ Wallace-Bruce (1998), p. 80.

¹⁰⁸ Mohebi (1999), p. 65.

¹⁰⁹ For the differences between the Security Account and a lump sum see: Mohebi (1999), pp. 65-66.

¹¹⁰ Paragraph 7 of the *General Declaration* states: 'As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a

of the deposit falls below US \$500 million, the Central Bank notifies Iran to maintain a minimum balance of US \$500 million in the Account.¹¹¹ The Security Account is an enforcement mechanism solely for US claims against Iran. Therefore, Iran does not enjoy such a unique mechanism to secure the payments of the Tribunal decisions and awards against the United States.

The second enforcement mechanism which can benefit both the US and Iran is stated in Article IV (3) of the *Claims Declaration*:

Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.¹¹²

This is the only enforcement method that has been used by Iran to enforce the decisions and awards against the United States, for instance, in Iran's action on 9 June 1987 to enforce the *Gould* award in the United States district court. (*Ministry of Defence of the Islamic Republic of Iran v Gould Marketing* (1984)).¹¹³

special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S. \$1 billion. After the U.S. \$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S. \$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S. \$500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.'

¹¹¹ Paragraph 7 of the *General Declaration*.

¹¹² Article IV (3) of the *Claims Declaration*.

¹¹³ Iran's action to enforce the *Gould* award in the United States. Iran's position in favour of characterizing the Tribunal's work as diplomatic protection and against passage of the proposed legislation remained constant from the spring of 1984 until June 1987, when Iran attempted to enforce an award of the Tribunal in the United States under the *New York Convention* on the ground that the award had Dutch nationality. On 29 June 1984, Chamber Two of the Tribunal rendered an award in favour of the *Ministry of Defence of the Islamic Republic of Iran* and against *Gould Marketing*, the US party, for

Why and How the Tribunal was established, its structure, tasks and important characters were discussed. The relationship between this Tribunal and this research is discussed below.

6.3.2.1. *The Iran-United States Claims Tribunal and Principle 139*

After introducing the Tribunal, the important question is how the requirements of Principle 139 have been dealt with in the adoption of the above-mentioned declarations establishing the Tribunal by Iran's constitutional institutions.

As discussed in the previous chapters, in the accession of Iran to international agreements including dispute settlement systems, there are some requirements which should be observed. To examine the relevant practice of Iran's Government, it is helpful to see whether Iran has observed the case-by-case approval approach in dealing with the referral of disputes to the Iran-United States Claims Tribunal. To answer to this question, how the *Algiers Declarations/Accords* were adopted by the domestic systems of Iran and the United States is presented below.

As discussed above, the *Algiers Declarations* were negotiated between Iran and the United States through the mediation of the government of Algeria. Then, each state separately adhered to the Declarations. This adherence has been taken addressed by several scholars and law experts. For instance, Wallace-Bruce (1998) says:

The Tribunal was not created by a state-state treaty or *compromise d'arbitrage*. Rather, the Government of Algeria made universal

\$3,640,247.¹³ Gould failed to pay the debt. On 9 June 1987, 20 days after the 3-year limit under the New York Convention (9 U.S.C. §207 (1988)), Iran petitioned the US District Court for the *Central District of California* to enforce the award. Judge Gadbois' order holding that US district courts have subject matter jurisdiction over actions to enforce Tribunal awards under the *New York Convention*, as codified in US law, was recently affirmed by the US Court of Appeals for the Ninth Circuit. Iran's position, however, has not quite come full circle. It still maintains before the Tribunal that the United States espouses the claims of its nationals on the basis of diplomatic protection. See Caron (1990), pp. 145-146.

declarations, and Iran and the United States adhered to them by way of independent commitments.¹¹⁴

It bears mentioning that an agreement/treaty is usually directly negotiated between at least two states or international organizations for it to be regarded as an international document. However, as mentioned above, Wallace-Bruce believes that the Declarations are independent commitments.

Allahyar Mouri, another law expert, distinguishes the Declarations from normal treaties. He says:

The Accords are different from normal treaties. They were declarations made by the Algerian Government and 'adhered to' by the Governments of Iran and the United States of America. Ratification was not made a requirement for their international effect, and they were not ratified by the United States Senate or the Iranian *Majles*.¹¹⁵

According to Mouri, the declarations are not normal treaties because, as he asserts, they have not been ratified on the basis of the constitutional system of its parties.

That is why Mohsen Mohebi (1999) has described the nature of the Tribunal as a hybrid. He says:

One may, though arguably, consider the Algiers declarations as a 'bi-unilateral' agreement: unilateral, because each Party has unilaterally committed itself towards the other Party by its signature on the Declarations, and bilateral because, ultimately, both Parties have adhered to the same commitments as reflected in a single instrument and, thus, agreed to be bound to those commitments reciprocally towards each other.¹¹⁶

¹¹⁴ Wallace-Bruce (1998), p. 77.

¹¹⁵ S.S. Ko, *Asian Yearbook of International Law: 1992*, Asian Yearbook of International Law Series (Martinus Nijhoff Publishers, 1994), p. 64.

¹¹⁶ Mohebi (1999), p. 69.

Therefore, the two most important arguments – among others¹¹⁷ – have been made on the legal validity of the Declaration are from two aspects: international law validity (1); and domestic law validity (2).

(1) From an international law perspective, the *Algiers Declaration/Accords* were not directly negotiated. They were agreed upon through mediation of a third country and signed separately by each party. However, the parties have finally accepted some commitments towards each other and accordingly a Tribunal, which is an international arbitration institution, was established. Therefore, there some agreements between two countries were also established, even though indirectly and through mediation.¹¹⁸

(2) From a domestic law perspective, it is argued that the declarations have not achieved the required adoption on the basis of the domestic law of the parties. For instance, Wallace-Bruce (1998) says:

The Declarations were neither put before the United States Senate nor the Iranian *Majles* for ratification. Despite this unusual approach, the international validity of the Declarations has generally been accepted, though their constitutional validity in municipal law of the respective states was contested.¹¹⁹

However, it bears mentioning that the domestic law validity of the Declarations under the United States legal system is different from that under Iran's constitutional system. This is because the Declarations have achieved the required domestic law validity through President Carter's Executive

¹¹⁷ The legal validity of the *Algiers Declarations* has been also contested from other aspects, such as being void due to Article 52 of the *Vienna Convention* that prohibited the conclusion of a treaty by the use or threat of force. This argument was made on the basis of this fact that the Declarations were established to resolve the American diplomats issue. However, this argument has been rejected by other scholars. For further discussions see: R. Khan, *The Iran-United States Claims Tribunal: Controversies, Cases, and Contribution* (Martinus Nijhoff Publishers, 1990), p. 24.

¹¹⁸ Mohebi believes: 'The Algiers Declarations constitute valid international obligations of two sovereign States and is an 'international treaty under the law of nations', reflected in three related instruments –General Declaration, Claims Settlement Declaration, and the Undertakings- certified by a third State –Algeria- and fall as such separately within the meaning of treaty, as provided in Article 2(1)(a) of the Vienna Convention'. See Mohebi (1999), p. 69.

¹¹⁹ Wallace-Bruce (1998), p. 77.

Orders that were issued simultaneously with the United States' *Statement of Adherence* to the Declarations and became part of the Accords¹²⁰. And also due to President Reagan's Executive Order no. 12294 (24 February 1981).¹²¹ Later the Supreme Court of the United States the *Dames and Moore v Reagan* case¹²² also upheld the authority of the United States with regard to the Accords.

Regarding Iran, it is argued¹²³ that the required adoption process was not followed for the Declarations. For instance, Wallace-Bruce states:

In the case of Iran, the argument was that the Accords were in violation of Principle 139 of the Iranian Constitution which requires that the Majles ratify all international contracts and settlement of governmental disputes.¹²⁴

And Mouri has expressed his view regarding the lack of authority for Iran's Government to sign and accept the Declarations:

Those who argue against the validity of the Accords contend that the Iranian negotiators had no authority to agree on arbitrations without the specific approval of the Majles, and that in so doing they contravened Principle 139 of the Constitution.¹²⁵

In contrast, there are, however, some opinions that support the validity by addressing the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America* which was adopted on 13 January 1981 by Iran's Parliament. The

¹²⁰ 46 Fed. Reg. 7913-7927 (1981); 3 C.F.R. 104-118 (1982), reprinted in U.S.C. Sec. 1701 at 150-151 (1982); and Lowenfeld, op.cit. n. 4, DS-850 to DS-869.

¹²¹ 46 Fed. Reg. 14,111 (1981); 3 C.F.R. 139-40 (1982) reprinted in 50 U.S.C. Sec 1701 at 155, and Lowenfeld, op.cit. n. 4, DS-872.

¹²² For further information on this case see: Khan (1990), pp. 18-23.

¹²³ The Dissenting Opinion of Shafie Shafiei in *Philips petroleum Company and Iran*; and *Amoco Iran Oil Company and Iran*, Interlocutory Awards Nos. 11-39-2 and 12-55-2, reprinted in 3 Iran-U.S. CTR 297, 305-308.

¹²⁴ Wallace-Bruce (1998), p. 77.

¹²⁵ S.S. Ko (1994), p. 64.

day after, the Declarations were adopted by the Board of Ministers and accordingly signed on 18 January by Iran's Government.¹²⁶

The important question that can be raised here is whether, under Iran's constitutional system, the required adoption process of accession to an international agreement was observed in adherence to the Declarations. In answering this question, there are some important points to be taken into consideration as follows.

(1) As discussed in chapter four,¹²⁷ the international agreements shall be first adopted by the Government (Board of Ministers) and then by the Parliament. However, the bill of Declarations was adopted first by the Parliament and then signed by the Government which is not consistent with the international agreement adoption process rules in Iran.¹²⁸

(2) The bill, which was discussed and adopted by the Parliament, did not contain the full text of the Declarations.¹²⁹ This was criticized by Ayat, a Parliament Member, at the beginning of the discussions on the Declarations in the Parliament. Mentioning the text of Articles 98 and 99 of the Rules of Procedure of Iran's Parliament (now Article 173¹³⁰), Mr. Ayat emphasized that, first, the agreement should be concluded between Iran and Unites States and then the full text of the agreement should be submitted to the Parliament.¹³¹ However, this argument was not accepted by the Head of the Parliament because, as he stated, the discussion was not whether to adopt the

¹²⁶ Maroussi and Zahedin Labaf (2011). p. 19.

¹²⁷ See chapter 4, section 4.3.2. (Negotiation and Signature by the Government).

¹²⁸ See the discussions on adoption process of international agreements in chapter 4, section 4.3. (What is Iran's Adoption Process of Accession to Multilateral Agreements such as the WTO?).

¹²⁹ The Letter of Iran's Prime Minister to the Parliament no. 55756 on 9 January 1981 included merely one attached document containing the text of the drafted bill in three lines. The text of the Declarations was not attached.

¹³⁰ Article 173 of the Parliament's Rules of Procedure states: 'Whenever the Government submits a bill to the Parliament requesting approval of any kind of treaty, memorandum of understanding, contract or international agreement or accession to international treaties, the full text of the documents must be appended to the bill submitted to the Parliament for investigation.'

¹³¹ The Parliament Discussions on the adoption of Algiers Declaration concerning the Iran-United States Claims Tribunal, Round 1, Session 96, dated 13 January 1981, Iranian Official Gazette no. 11836.

Declarations. The Parliament was asked merely to authorize the Government to accept the arbitration mechanism concerning Iran and United States disputes in general.¹³² Therefore, only that general authorization for arbitration was adopted by the Parliament. As a law expert from Iran's legal system, I cannot understand what the general authorization means. This is because generally there is no such method legally accepted by Iran's Constitution or the Parliament's Rules of Procedure. That is also, I think, why several Parliament Members criticized this method during the relevant discussion in the Parliament.

(3) Most Parliament Members who discussed the Government's bill in the Parliament emphasized that Principle 139 of the Constitution shall be observed by the Government with regard to the referral of disputes between Iran and United States to arbitration (Tribunal) based on a case-by-case approval approach.¹³³

(4) Responding to the issue of the inconsistency of the Government's bill with Principle 139 of the Constitution, the Head of the Parliament (Hashemi Rafsanjani) stated:

We have discussed this issue (Principle 139) with the Government before. When the Government requested the bill to be discussed very fast (two star urgent) in the Parliament, we said that in each specific case of referral to arbitration or settlement of dispute, the Parliament shall be informed and it shall be approved by the Parliament... They (the Government) said that in each case (referral to arbitration or

¹³² Ibid.

¹³³ Among the Parliament Members who refer to the inconsistency between the bill and Principle 139 of the Constitution are: Ayat, Mohammad Khamenei, Fazlollah Salavati, Hadi, Motaki, Mahalati. Almost after each statement on Principle 139, the Head of the Parliament (Hashemi) responded that the Parliament was discussing the general authorization and later the Government shall observe the requirements of Principle 139 on the basis of a case-by-case approval approach, see The Parliament Discussions on adoption of Algiers Declaration concerning the Iran-United States Claims Tribunal, Round 1, Session 96, dated 13 January 1981, Iranian Official Gazette no. 11836.

settlement of dispute) they will submit it to the Parliament to be approved there.¹³⁴

However, this undertaking has never been complied with by the Government with regard to the referred disputes to the Iran-US Claims Tribunal.

(5) The representative of the Government (Behzad Nabavi who negotiated and finally signed the Declarations) clearly requested the Parliament to accept the referral to arbitration in general.¹³⁵ In other words, he convinced the Parliament that the case-by-case approval approach stated in Principle 139 will be observed in each case of referral to arbitration.

(6) The Parliament adopted the Government's bill, which did not include the text of Declarations on the basis of this view that the case-by-case approval approach (the requirement of Principle 139 of the Constitution) shall be observed by the Government.

(7) The Government's bill was discussed in the Parliament very fast (two star urgent). In the two star urgent reading method, ¹³⁶the Guardian Council's Members shall be available during the Parliament's discussions. Therefore, the Guardian Council checked the constitutionality of the bill, which did not include the full text of the Declarations. More importantly, the constitutionality review was performed by the Guardian Council on the basis of this view that the requirements of Principle 139, including the case-by-case approval approach, shall be observed by the Government with regard to the referral of each dispute to the Iran-United States Claims Tribunal. That is why, in its letter on 13 January 1981, the Guardian Council declared that the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America* and its 'Note' which was adopted by the Parliament in the presence of the

¹³⁴ The Head of the Parliament's reaction to the raised question of inconsistency of the bill with Principle 139 of the Constitution referring to the question of Mr. Ayat), The Parliament Discussions on adoption of Algiers Declaration concerning the Iran-United States Claims Tribunal, Round 1, Session 96, dated 13 January 1981, Iranian Official Gazette no. 11836. (Translation S.A).

¹³⁵ Ibid.

¹³⁶ For further information on Parliament's reading methods see chapter 4, section 4.3.3.2. (Agreement Adoption Phases in the Parliament).

Members of the Guardian Council on 13 January 1981 was checked in the formal meeting of the Guardian Council and was not considered to be inconsistent with the Constitution.¹³⁷

(8) The *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America* was adopted by the Parliament on the basis of the view that the Government shall follow the requirements of Principle 139 of the Constitution. However, in the referral of each dispute to the Iran-United States Claims Tribunal, the Government never requested an authorization from the Parliament and followed a *blanco* approval approach.

(9) The *blanco* approval approach, which is not in compliance with the requirements of Principle 139 by the Government, has been objected to by the Members of the Parliament and was criticized in a detailed report. Under Principle 76 of Iran's Constitution: '*The Islamic Consultative Assembly (the Parliament) has the right to investigate and evaluate all the affairs of the nation.*' The *investigation and evaluation of the Arbitration process between Iran and United States* was adopted by Iran's Parliament on 21 August 2007 and was referred to the National Security and Foreign Policy Committee of the Parliament. The final report of the Committee was submitted to the Parliament on 20 and 21 May 2008. In this report, the Government did not observe the requirement of the case-by-case approval approach in the referral of disputes between Iran and United States to arbitration or conciliation. This is recognized by the report as a clear non-compliance and inconsistency with Principle 139 of the Constitution.¹³⁸

It bears mentioning that, under Article 216 of the Rules of Procedure of the Parliament: 'If the Committee report succeeds to prove the offense and follow up the inquiry, the offender will be introduced to the Judiciary or the

¹³⁷ The Guardian Council's letter no. 55-م dated 13 January 1981 to the Parliament concerning the Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America.

¹³⁸ Round 7 of Iran's Parliament, Sessions 426 and 427, dated 20 and 21 May 2008, Iranian Official Gazette no. 18428, for the full text see the Library of Iran's Parliament website at: <http://ical.ir>, last visited on 1-10-2016.

authority in charge of probing into administrative offenses in proportion to the case(s) of offense so that the Committee appeal would be investigated on emergency and the result would be announced to the Committee'.¹³⁹ This enforcement process has been started by referral of the aforementioned report to the courts, even though no result has been declared yet.

To conclude, the *blanco* approval approach of the Government with regard to Principle 139 of the Constitution is not recognized by the Parliament (and the Guardian Council) as being legitimate.

The requirements of Principle 139 Iran's Constitution have also been discussed in some cases before the Tribunal, which are presented below.

6.3.2.1. Iran's Dissenting Opinion and Principle 139 in Iran-United States Claims Tribunal

Iran's domestic law restrictions including Principle 139 have been discussed at least twice before the Iran-United States Claims Tribunal in:

- *Philips Petroleum Company v The Islamic Republic of Iran, The National Iranian Oil*, Case no. 39 Chamber Two Award No. ITL 11-39-2 (30 December 1982); and

- *AMOCO Iran Oil Co v The Islamic Republic of Iran, the National Iranian Oil Company, The Iranian Offshore Oil and the Iranian Oil Company*, Case No. 55, Chamber Two Award No. ITL 12-55-2 (30 December 1982).

Each one is presented below.

Philips Petroleum Company Dispute

In 1965, the Phillips Petroleum Company, AGIP and the Oil and Natural Gas Commission of India (Indian Commission) concluded an agreement with NIOC on the exploration, development and production in relation to certain offshore petroleum fields in Iran and formed the Iranian Marine International Oil Company (IMINOCO). On 11 August 1980, Phillips was informed that, pursuant to Iran's Single Article Act of 8 January 1980, Iran's Special

¹³⁹ Article 216 of the Rules of Procedure of the Parliament. (Translation Iran's Parliament website).

Committee declared the IMINOCO Agreement and the relevant supplemental agreement(s) null and void. Therefore, on 16 November 1981, a claim was filed by Phillips in the Iran-United States Claims Tribunal against Iran and the National Iranian Oil Company (NIOC).

The Tribunal was asked by the respondents to consider as a preliminary question their assertion that the Tribunal lacks jurisdiction because of the following reasons:¹⁴⁰

(1) the Single Article Act of 8 January 1980, issued by Iran's Revolutionary Council on the establishment of a Special Commission concerning oil agreements, provided for the exclusive jurisdiction of the mentioned Commission in this case;

(2) the provisions of Article II of the *Claims Settlement Declaration* excluded the claim from the jurisdiction of the Tribunal;

(3) the claim was not outstanding on 19 January 1981, since the case had not been filed with any court;

(4) since Phillips, AGIP, and the Indian Commission entered into the IMINOCO agreement as a partnership as a Second Party, any claims by the partnership against NIOC as First Party would have to be asserted by the Second Party and not Phillips alone.

On 30 December 1982, the Tribunal rejected the first three reasons and, regarding the fourth one, decided that it must be joined to the merits of the case. On the same day, another decision was adopted by the Tribunal with regard to AMOCO dispute.

- AMOCO Iran Oil Co Dispute

In 1958, the Pan American Petroleum Corporation concluded an agreement with Iran's National Iranian Oil Company (NIOC) to explore oil and extract and sell it together with NIOC. Amoco Iran and NIOC formed the Iran Pan American Oil Company (IPAC). On 11 August 1980, Amoco was informed that the Special Committee, which was formed on the basis of Iran's Single

¹⁴⁰ Iran-United States Claims Tribunal Award No. ITL 11-39-2, *Philips Petroleum Company v The Islamic Republic of Iran, The National Iranian Oil* (30 December 1982), Reprinted in: I- I.US.CT.R. 487.

Article Act (adopted on 8 January 1980), declared the IPAC agreement and the relevant supplemental agreement(s) null and void. Therefore, on 17 November 1981, a claim was filed by Amoco in the Iran-United States Claims Tribunal.

The Tribunal was asked by the respondents to consider as a preliminary question their assertion that the Tribunal lacked jurisdiction in this case because of this alleged nullification. The reasons were exactly the same as first three arguments which were given by the respondents in the *Philips Petroleum Company Dispute*. The Tribunal rejected all three arguments as invalid.¹⁴¹

Shafie Shafeiei, who was Iran's arbitrator in the Tribunal, issued his dissenting opinion with regard to the aforementioned cases (No. 39 and 55) and announced the issued interlocutory awards as null and void on the basis of the following reasons:¹⁴²

- the majority in Chamber Two exceeded the Chamber's limited authority and mandate;
- the awards were based on prejudgment;
- the respondents' right to a proper defence and hearing were thereby denied;
- defences contained in the respondents' Memorials were not considered.

In the *Philips Petroleum Company Dispute*, the Iranian party (respondent) claimed the lack of jurisdiction of the Tribunal. The reason for this claim was that Iran's consent given to the jurisdictional provisions of the *Claims Settlement Declaration* was limited to some 'specific restrictions', including the requirements of Principle 139 and the exception stated by Iran's Parliament in the Note to the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America*.

¹⁴¹ Iran-United States Claims Tribunal Award No. ITL 12-55-2, AMOCO Iran Oil Co v The Islamic Republic of Iran, the National Iranian Oil Company, The Iranian Offshore Oil and the Iranian Oil Company, (30 December 1982), Reprinted in: 1- IUS.CT.R. 493.

¹⁴² The Dissenting Opinion of Shafie Shafeiei in *Philips Petroleum Company and Iran*; and *Amoco Iran Oil Company and Iran*, Interlocutory Awards Nos. 11-39-2 and 12-55-2, reprinted in 3 Iran-U.S. CTR 297, 305–308.

By addressing Article 47 of the *Vienna Convention on the Law of Treaties* (1969),¹⁴³ the claimed restrictions were rejected by the Chamber because the restrictions had not been notified to the parties before consenting to the *Algiers Declarations*. The Chamber also rejected that the claimed restrictions possess 'fundamental importance' and being 'manifest', as required by Article 46 (1) of the *Vienna Convention on the Law of Treaties* (1969),¹⁴⁴ 'for invalidating Iran's consent to the *Algiers Declarations* in whole or in part.' Accordingly the Chamber concluded that:

Iran may not now invoke 'provisions of its internal law' such as the Single Article Act to avoid any obligations to perform the *Algiers Declarations*.¹⁴⁵

It bears mentioning that one of the restrictions which were not accepted by the Chamber was that which was stated in the Note to the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America*. The Note states: 'With respect to those disputes the settlement of which by competent Iranian tribunals has been provided in the respective contract, such disputes are excluded from being subject to this Single Article Act.'¹⁴⁶ This Note, I think, has clearly restricted Iran's consent to the *Algiers Declarations* with regard to the jurisdiction of the Tribunal. This, however, has been disregarded by the Chamber.

¹⁴³ Article 47 of the *Vienna Convention on the Law of Treaties* (1969) states: 'If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.'

¹⁴⁴ Article 46 (1) of the *Vienna Convention on the Law of Treaties* (1969) states: 'A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.'

¹⁴⁵ The Dissenting Opinion of Shafie Shafiei in *Philips Petroleum Company and Iran*, *ibid*.

¹⁴⁶ The translation is taken from: A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunals*, Developments in International Law (Martinus Nijhoff Publishers, 1994), p. 6.

Shafeiei, in his dissenting opinion states that the restrictions stated by a country's constitution comprise fundamental rules of that country's internal law. He believes that the mentioned restrictions, which are stated in a written constitution, possess 'international notoriety'¹⁴⁷ of which the United States had been aware when accepting the *Algiers Declarations*. In his conclusion regarding the Principle 139 restrictions, Shafeiei states:

In conclusion then, the Government of the United States was, or certainly ought to have been, fully cognizant of the statutory limitations imposed upon the Iranian negotiators, because the November Resolution had been notified to it and the said limitations were clearly imposed by the Iranian Constitution, whose provisions are to be considered public, notorious and manifest like those of other constitutions. Moreover, the U.S. ought to have been aware of such a limitation because many constitutions, indeed including that of the United States of America, limit the power of treaty negotiators and require parliamentary approval before they can come into effect. The history of the relations between Iran and the United States points to the same conclusion.¹⁴⁸

Considering the reasoning declared by the Chamber for rejecting Iran's domestic law restrictions, including the Principle 139 requirements, it can be asserted that the restrictions have not been recognized by the Chamber because the other party (United States) had not been adequately informed by Iran about the restrictions. This posits the view that Iran's domestic law restrictions were rejected by the Chamber on the basis of the principle of

¹⁴⁷ After citing the provisions of Article II, Section 2 of the Constitution of the United States of America, McNair states that: 'The foregoing is an illustration of a fundamental provision in a constitution, and we submit with confidence that provisions of this character must be regarded as possessing international notoriety so that other states cannot hold a state bound by a treaty when in fact there had been no compliance with a constitutional requirement of this type' (A.D.B. McNair, *Constitutional Limitations Upon the Treaty-making Power: Introductory Notes* (Publisher not identified, 1933), p. 4. See also S.I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, Second ed. (Manchester University Press, 1984), p. 90).

¹⁴⁸ The Dissenting Opinion of Shafie Shafiei in *Philips petroleum Company and Iran*; and *Amoco Iran Oil Company and Iran*, Interlocutory Awards Nos. 11-39-2 and 12-55-2, reprinted in 3 Iran-U.S. CTR 297, 305-308.

'good faith', which is discussed above in analyzing the practical implementation of Principle 139 in international arbitrations in this chapter.¹⁴⁹

To conclude, the practical application of Principle 139 by Iran's Government can be recognized through its *blanco* approval approach in the referral of a number of disputes to 'the longest running international arbitral tribunal in history'.¹⁵⁰ Even though this *blanco* approval approach is not legally recognized by the Parliament and the Guardian Council and is inconsistent with the wording and the purpose of Principle 139 of the Constitution, it was followed by the Government for more than three decades and still is.

It bears considering that, as discussed above, the *blanco* approval approach was not intended to be followed by Iran's Government from the beginning. The Government – as can be understood from the meeting between the Head of the Parliament and the Nabavi who negotiated the *Algiers Declarations* with the United States (through mediation of Algeria) – intended to get the Parliament's general consent with regard to the Tribunal and then the Parliament's authorization on the referral to arbitration in each case would be requested by the Government. However, the Tribunal, by failing to recognize the Principle 139 restrictions, blocked the intended case-by-case approval approach which was supposed to be followed by Iran's Government in the referral of disputes to the Tribunal.

Therefore, it should be taken into consideration that the *banco* approval approach cannot be interpreted as removing the conflict between the WTO Dispute Settlement Understanding and Principle 139 of Iran's Constitution. This is because, to join the WTO, Iran needs to agree to the accession protocol in the adoption process discussed in 4.3.5.6. WTO Accession Focus As analyzed in the previous chapters, if Iran's Parliament adopted the accession protocol on the basis of the *blanco* approval approach, the Guardian Council would send the protocol of WTO accession back to the Parliament due to its inconsistency with Principle 139. This would result in a legal impediment to Iran's WTO accession.

¹⁴⁹ See section 6.3.1. (International Arbitrations).

¹⁵⁰ See the Wallace-Bruce's quote above, p. 80.

To remove the above-mentioned legal impediment, there are some questions which can also be helpful to provide more clarification of the relevant issues in the adoption process of Iran's accession to the WTO, which are presented below.

6.4. Questions on How to Remove the Legal Impediment

After the discussion on how Principle 139 of Iran's Constitution is used in practice by Iran's constitutional institutions and also international arbitrations, there are some questions to be addressed. The questions are on whether the no conflict interpretation can prevail to remove the legal impediment to Iran's WTO accession; whether Iran's Parliament can check the constitutionality (to remove the legal impediment on the basis of national interest); the issue regarding the constitutionality review of the compulsory jurisdiction in Iran's WTO accession, how a dispute can be referred to the National Expediency Council; and finally whether the decision of the mentioned Council on the adoption of Iran's WTO accession is temporal. Each one is shortly discussed below.

- The first question is whether a no conflict interpretation/argument can prevail because of changes and new developments in the world?

To answer to this question, it should be taken into consideration that, as discussed in chapters three, four and five, there are clear rules on the adoption process of multilateral agreements in Iran. The protocol of WTO accession first shall be adopted by the Government. The Government can follow a no conflict interpretation on the basis of its *blanco* approval approach. However, the protocol of accession shall be submitted to the Parliament after its adoption by the Board of Ministers. As discussed in the previous chapters and also this chapter, the Parliament does not recognize the *blanco* approval approach as being legitimate. However, even if the Parliament adopted the protocol on the basis of the so-called changes and new developments in the world, the protocol would be sent back to the Parliament because of its inconsistency with the Constitution.

Therefore, the no conflict interpretation would have worked in removing the legal impediment to Iran's WTO accession if the Guardian Council would have been authorized by the Constitution to disregard the requirements of Principle 139 on the basis of any reason, such as new changes and

developments. The only constitutional institution which can work on the basis of national interest/expediency is the National Expediency Council.

- Another question which can be raised is whether the Parliament should only check if accession is good for the country and not concerning constitutionality.

To answer this question, as discussed in chapters three¹⁵¹ and four,¹⁵² under Article 196 of its Rules of Procedure, the Parliament can check the constitutionality. Under Principle 72¹⁵³ of the Constitution, as discussed in chapter five,¹⁵⁴ the Parliament cannot legislate laws that contradict the Constitution or Islamic Principles. However, the task of a constitutionality review is referred by the Constitution to the Guardian Council which includes required (Islamic) law experts. Therefore, the Parliament should check the WTO accession for not only whether it is good for the country, but also for the constitutionality.

- Another important question concerns whether the Government, Parliament, and Guardian Council should question the constitutionality of the compulsory jurisdiction in accession to the WTO?

As discussed in chapter two,¹⁵⁵ the compulsory jurisdiction means that each WTO Member enjoys assured access to the dispute settlement system and a responding Member cannot escape its jurisdiction. This can result in a legal conflict between this compulsory commitment of Iran and the requirements of Principle 139, which require that the referral of state and public property disputes to dispute settlement mechanisms be authorised based on a case-by-case approval approach by the Parliament.

¹⁵¹ See chapter 3, section 3.5.4. (Legislature).

¹⁵² See chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process).

¹⁵³ Principle 72 of Iran's Constitution states: 'The Islamic Consultative Assembly cannot legislate laws that contradict the canons and principles of the official religion of the country or the constitution. The Guardian Council is responsible for the evaluation of this matter, in accordance with Principle 96.'

¹⁵⁴ See chapter 5, section 5.4.3. (National Interest and the Parliament, Guardian Council and the NEC).

¹⁵⁵ See chapter 2, section 2.3. (Nature of the WTO Dispute Settlement System (DSS)).

Usually the Government and the Parliament should ask this question and can provide some solutions in order to observe the constitutionality. To avoid unconstitutionality, sometimes the Government and the Parliament, as discussed in chapter four formulate reservations. However, under WTO law, no reservation is accepted in the accession to the WTO Dispute Settlement Understanding.¹⁵⁶ In addition, as discussed in chapter four,¹⁵⁷ the Guardian Council believes that if the multilateral agreement does not accept reservations, this cannot also be accepted by the Guardian Council and therefore, a reservation in this case cannot remove the unconstitutionality issue.¹⁵⁸

The question of compulsory jurisdiction would also be addressed by the Guardian Council, which is given the task by the Constitution to check the constitutionality.

- Another question concerns the procedure and legal bases for the referral of a dispute to the National Expediency Council.

Under Principle 112 of Iran's Constitution, when there is a dispute between the Parliament and the Guardian Council on an adopted legislation – such as WTO accession – and despite the unconstitutionality of the legislation, the Parliament considers it necessary for the country, the National Expediency Council can be asked to resolve the dispute.

As discussed in chapter three,¹⁵⁹ a few years after Iran's 1979 Revolution, there were some disputes between the Government and Parliament from one side and the Guardian Council on the other side. Due to the fact that the adopted bills by the Parliament included an inconsistency with the Constitution, they were sent back by the Guardian Council to the Parliament. However, both the Government and the Parliament believed that the adopted bills were necessary for the country. The easy solution was to amend the Constitution to remove the inconsistencies. However, in most cases the bills suggested by the Government had temporal importance and, after some

¹⁵⁶ Article XVI:5 of the WTO Agreement.

¹⁵⁷ See chapter 4, section 4.4.4. (Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?).

¹⁵⁸ See chapter four, *ibid*.

¹⁵⁹ See chapter 3, section 3.5.5. (National Expediency Council).

years, they had to be replaced by new legislation. Therefore, a developing country like Iran whose system usually requires new solutions to achieve a sustainable development cannot undergo frequent amendments to the Constitution on the basis of its daily needs. That is why the National Expediency Council was established to resolve this issue. The National Expediency Council can adopt legislation which is necessary for the country, even if it includes inconsistency with the Constitution. How this works was discussed in chapters three and four.¹⁶⁰

Therefore, in joining the WTO, if the Guardian Council sends the accession protocol back to the Parliament and the Parliament regards the protocol as being necessary for the country, the protocol will be sent back to the Guardian Council and then again to the Parliament. Then, to resolve the issue, the National Expediency Council can be asked by the Head of the Parliament to examine and adopt Iran's WTO accession protocol.

- The final question is, if the approvals of the National Expediency Council are temporal, what will happen to the compulsory jurisdiction of the DSS?

The decisions regarding the adoption of multilateral agreements such as the WTO cannot be temporal. In practice, the National Expediency Council decisions on Iran's accession to multilateral agreements support this view that these decisions are not temporal.¹⁶¹ This is discussed in chapter five.¹⁶²

6.5. Conclusion

To remove the legal impediment to Iran's WTO accession, the legal interpretations were discussed in the previous chapter. It was also discussed that there is a no conflict view which can be supported by some legal interpretations. To establish whether this view is actually supported in

¹⁶⁰ See chapter 4, section 4.3.5. (The Role of the National Expediency Council in the Accession Process).

¹⁶¹ To see the multilateral and bilateral agreements which have been adopted by the National Expediency Council see the website of the National Expediency Council at: <http://maslahat.ir>, last visited on 1-10-2016.

¹⁶² See chapter 5, section 5.4.3. (National Interest and the Parliament, Guardian Council and the NEC).

practice by Iran's constitutional institutions, the relevant practice of the Parliament and the Government was analyzed in this chapter.

Through several approvals, the Parliament has supported the enforcement of Principle 139 of Iran's Constitution including the case-by-case approval approach. Even though the Government has mostly observed Principle 139 in dispute settlements, it has sometimes followed the *blanco* approval approach. Therefore, from a systemic interpretation perspective, the no conflict view can be supported through the Government's practice. This practice however has not been recognized by other constitutional institutions. Therefore, the lack of the required legal capacity for the Government to waive this constitutional commitment can result in controversial issues if the result of a dispute – as a judgment or award – would need to be recognized and enforced by Iran's legal system.

Another argument to support the no conflict view comes from a tendency in international arbitration not to accept the domestic law restrictions such as Iran's Principle 139 requirements. This tendency originates from emergence of a so-called 'international public policy' which has been created and developed through a few arbitration awards such as: Arbitration Award No. 3896 of 1982 on the *Framatome v. Atomic Energy Organization of Iran*; and Arbitration Award no. 4381 of 1986 on an Iranian state company and a French company. Due to the examination of some of these awards in this chapter, it can be asserted that the above-mentioned policy has emerged on the basis of the 'good faith' principle, which means that Iran's party had not adequately informed the other party about its constitutional restrictions when concluding a contract.

The no conflict view supporters have also taken how Iran's constitutional institutions have dealt with Iran-United States Claims Tribunal as a good example of the lack of legal impediment to Iran's WTO accession on the basis of Principle 139. This is because, in the referral of disputes to this Tribunal, Iran's Government has not followed a case-by-case approval approach. However, as discussed in this chapter, during the adoption process of the *Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America* (1981), the requirements of Principle 139 were emphasized by the Parliament and the Government, declaring its commitment to the mentioned

requirements in the referral of disputes to the Tribunal, even though later the Government followed a different approach. It was also discussed in this chapter that the Tribunal's reaction in two cases to Iran's domestic restrictions including Principle 139 is consistent with the above-mentioned 'international public policy', which again was a result of the 'good faith' principle (the restrictions had not been notified to the parties before consenting to the *Algiers Declarations*). It bears mentioning that the Government's *blanco* approval approach regarding the referral of disputes to the Tribunal is taken by the Parliament as being inconsistent with Principle 139 of the Constitution and has been referred to the courts.

To conclude, the no conflict view cannot be legally supported by Iran's legal system to the extent that it is required to remove the discussed legal impediment. Therefore, other solutions will be discussed in the subsequent chapter.

Chapter 7: Solutions

7.1. Introduction

It was seen in chapters one to four that there is a legal impediment to Iran's accession to the WTO. It was discussed in chapters five and six whether this legal impediment can be removed through the legal interpretation of Principle 139 of Iran's Constitution. Also the no conflict view was introduced.

Other solutions to remove the legal impediment resulted from the conflict between Principle 139 and the WTO DSS compulsory jurisdiction – which is the third research question of this dissertation –, are introduced in this chapter. In doing so, both political and legal solutions under WTO law and Iran's legal system are analyzed.

The first political solution (pragmatic) is introduced on the bases of the national security practice of the United States in the WTO dispute settlement system. (7.2.1) The *Helms-Burton Act* caused a dispute that was taken to the DSS against the United States by the EC. However, the US did not participate, even though the US should have been subject to the compulsory jurisdiction of the DSS.

Thereafter, the legal solutions under WTO law are discussed. (7.3) Reservations, as will be discussed in section 7.3.1.1, are a mechanism that have been used by Iran in removing inconsistencies between international agreements and its Constitution. However, whether this mechanism works in Iran's accession to the WTO will be examined in section 7.3.1.2. It is also discussed, if the reservation does not work, how it would be possible to disregard the inconsistency through consensus of the WTO Members (7.3.1.3).

Under WTO law, acceding countries and WTO Members are not obliged to accept each another as trade partners. This can be done through an opt out which is presented in section 7.3.2. However, whether this mechanism can resolve Iran's problem in its accession to the WTO will be discussed.

The legal solutions on the basis of Iran's legal system are introduced in section 7.4. Under Principle 112 of Iran's Constitution, there are a number of international agreements which have been adopted by the National Expediency Council. Whether the WTO protocol of accession can be adopted

through this mechanism is examined in section 7.4.1. Whether it is practical under Iran's legal system to remove the legal impediment by the direct involvement of Iran's Leader in the adoption process of the WTO accession protocol is discussed in section 7.4.2.

The no conflict view was discussed in chapters five and six. It is briefly mentioned in this chapter if this view can work to accelerate Iran's accession process (7.5). The no conflict view can be supported by some arguments: whether the WTO DSS has a judicial nature to be excluded from the scope of Principle 139 (7.5.1); the adoption process of Iran-United States Claims Tribunal (7.5.2) and the similar experience of other countries that have acceded to the WTO (7.5.3).

7.2. Pragmatic Solutions

The dispute settlement system of the WTO includes a number of dispute settlement mechanisms which are introduced in chapter two.¹ A question which is worth examining here is what would happen if Iran's Parliament does not approve sending an issue to a dispute settlement system? To examine this question, we need to link it to the main subject of this chapter, i.e. the WTO dispute settlement system. If Iran's Parliament does not approve of using the WTO dispute settlement system concerning a dispute, Iran can be seen in one of two different positions here: *as a complainant (1); or as a responding party (2)*.

(1) As a complainant

If Iran decides to resolve a dispute which falls under one of the WTO agreements, but its Parliament does not approve it, Iran cannot refer to the WTO dispute settlement system.

If using the WTO dispute settlement system is not approved by Iran's Parliament and the dispute is under the jurisdiction of the WTO Agreement, can Iran use other systems of dispute settlement? Such as for example a judicial dispute settlement system like the International Court of Justice?

¹ See chapter 2, section 2.3.4. (The DSS Institutions and Mechanisms).

Pursuant to the WTO Dispute Settlement Understanding Article 23(1), the WTO dispute settlement system has an exclusive jurisdiction to resolve the disputes with regard to the WTO agreements.

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.²

Accordingly, the DSS exclusive jurisdiction – with regard to disputes under the WTO agreements – appears to bar the application to other dispute settlement systems.

(2) As a responding party

If a claim by a complainant against Iran is sent to the WTO dispute settlement system, requesting ‘consultations’, but Iran’s Parliament does not approve Iran’s participation in that system, what can be the legal consequences for Iran? In addition to being exclusive, the WTO dispute settlement system is also mandatory. Under the WTO DSU Article 4(3), if consultations are requested by a complainant, the responding party ‘shall’ reply to it.

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.³

Therefore, Iran, as a responding party in a dispute in the WTO dispute settlement system is obliged to participate, even though its Parliament rejects this participation. Legally speaking, if Iran does not participate, the complainant can request the establishment of a panel and the result of the

² See ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ text at: http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm, last visited on 1-10-2016.

³ Article 4.3 of the WTO DSU.

case will be finally imposed upon Iran, unless a mutually agreed solution is reached between the parties to the dispute.⁴ Nevertheless, it can be argued that, when the 'core national interests' or the 'national security' of a responding party is endangered as will be discussed below with regard to the United States reaction to *Helms-Burton* dispute- a country cannot be forced to participate in a tribunal.

If the required authorization on the basis of Principle 139 is not obtained from the Parliament and, due to the compulsory jurisdiction of the WTO DSS, Iran participates in such a dispute settlement process, the enforcement of the final result (rulings and recommendations) will be considered invalid under Iran's legal and judicial system and, therefore, it cannot be enforced in Iran. In other words, Iran's constitutional institutions will not change or amend a law or regulation which is inconsistent with the WTO agreements. However, whether this can influence enforcement through other mechanisms outside Iran needs further discussion. For instance, the retaliation measures imposed by the complainant would not require any enforcement in Iran. Retaliation measures would typically take the form of the imposition of high (above binding) customs duties on Iranian exports. A detailed discussion of this issue is beyond the limited scope of this dissertation. Whether or not Iran can escape from the compulsory jurisdiction of the DSS is examined in the following section.

7.2.1. Non-Compliance with WTO Rules Based on National Security

It was discussed that, due to the compulsory jurisdiction of the DSS, a WTO Member shall participate in disputes as a responding party. However, to participate in such a dispute, Iran needs an authorization from its Parliament. There is a WTO dispute in which the responding party did not participate in the dispute settlement process. This case and whether Iran can take a similar approach in the DSS are analyzed below.

⁴ See chapter 2, section 2.3.5. (The WTO Dispute Settlement Process).

7.2.1.1. *Helms-Burton Act*

On 12 March 1996, the President of the United States signed a law named ‘*Cuban Liberty and Democratic Solidarity Act of 1996*’⁵ which is known as the ‘*Helms-Burton Act*’. Part III of this Act, which was the most important part of the law, provided a basis for claims in US federal courts for civil damages against anyone who trafficked property that was confiscated from US citizens by the Cuban Government. This was considered, due to the circumstances of that time, to be a secondary boycott against anyone’s business in or with Cuba. The first part of this law restricted the entry of products from countries which were net importers of Cuba into United States and could not guarantee that, for example, the sugar they were exporting to the US was not from Cuba. The prohibition Cuban products also included goods of third countries which were made or derived from Cuban goods.⁶

The Inter-American Juridical Committee, in response to its General Assembly, issued an advisory opinion,⁷ which criticized the *Helms-Burton Act* and considered it to be a violation of international norms. Mexico and Canada referred this Act to the *North American Free Trade Agreement (NAFTA)*⁸ dispute settlement system.⁹ On 3 March 1996, the European Communities

⁵ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, (Codified in Title 22, Sections 6021-6091 of the U.S. Code), P.L. 104-114, One Hundred Fourth Congress of the United States of America, see <https://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf>, last visited on 1-10-2016.

⁶ See: H.L. Schloemann and S. Ohlhoff, "Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence", *The American Journal of International Law* (1999) 93, p. 424.

⁷ OAS Document: CJI/SO/II/doc.67/96 rev.5 (Aug. 23, 1996), reprinted in 35 ILM 1329 (1996).

⁸ In 1994, the North American Free Trade Agreement (NAFTA), a state-of-the-art market-opening agreement, came into force. Since then, NAFTA has systematically eliminated most tariff and non-tariff barriers to trade and investment between Canada, the United States, and Mexico. By establishing a strong and reliable framework for investment, NAFTA has also helped create the environment of confidence and stability required for long-term investment. NAFTA was preceded by the Canada-U.S. Free Trade Agreement. For further information see: <http://www.naftanow.org>, last visited on 1-10-2016.

⁹ The NAFTA includes impartial, rules-based dispute resolution mechanisms to provide the assurance of fairness and predictability that North American businesses need to engage in commercial exchanges. If a dispute arises, NAFTA directs those concerned to try to resolve their differences through NAFTA committees and working groups or

(which later became the 'European Union') asked for consultations with the United States in the WTO dispute settlement system and, as the US did not participate in the consultations, the EC requested the Dispute Settlement Body (DSB) to establish a Panel on 20 November 1996.¹⁰ The European Community claimed that United States trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-US nationals from United States territory, were inconsistent with the United States' obligations under the WTO agreements.¹¹ The United States first blocked the establishment of the panel and, when it was requested by the European Communities for the second time, it decided to deny the WTO Dispute Settlement Body's authority to hear the case and claimed that it lacked competence to decide on the American invocation of the 'National Security' exception.¹² It bears considering that the US could only have invoked the national security exception of the GATT (Art. XXI) and GATS (Art. XIV bis) if it filed submissions before the panel. However, the US did not do this.

Under Article XVI:4 of the WTO Agreement the United States, as a WTO Member, shall make its legal system and measures entirely consistent with the WTO agreements:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.¹³

Nevertheless, it can be argued that, when an important issue of national interest and security is impaired, measures such as the *Helms-Burton Act* in the case of the United States may be taken only if such measures are justified

through other consultations. For further information see the NAFTA website at: <http://www.naftanow.org>, last visited on 1-10-2016.

¹⁰ See the WTO website on this dispute: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm, last visited on 1-10-2016.

¹¹ United States - The Cuban Liberty and Democratic Solidarity Act - Request for Consultations by the European Communities, WTO Document: WT/DS38/1, G/L/71, S/L/21, 13 May 1996.

¹² Schloemann and Ohlhoff (1999), p. 424.

¹³ Article XVI:4 of the WTO Agreement.

under Article XXI GATT or Article XIV bis GATS. It is obvious that the US considered these inconsistencies to be other than those that could be justified by the exceptions provided in the WTO agreements. That is why the US did not invoke the national security exception of the GATT (Art. XXI) and GATS (Art. XIV bis) before the panel. The US first blocked the establishment of a Panel requested by the European Communities, then, after the establishment of a Panel was requested for the second time and subsequently established by reverse consensus, the US rejected the competence of the Panel. In this regard a United States' senior official said:

We would not show up ... This is a matter that touches on foreign policy and national security of the United States, as to which no Panel is competent.¹⁴

There is no doubt that taking some measure by the United States on the basis of national security is clearly an approach demonstrating that a WTO Member was not willing to let the consistency of its measures (with WTO law) be examined in the WTO dispute settlement system. It therefore also did not invoke the general exceptions of the GATT 1994 and/or GATS.¹⁵ It is worth mentioning that the United States, at the time of adopting the WTO agreements, did not make reservations to this effect.¹⁶

¹⁴ International Centre for Trade and Sustainable Development, "US Refuses WTO Helms-Burton Authority," 24 Feb. 1997, available at <http://www.ictsd.org/bridges-news/bridges/news/us-refuses-wto-helm-burton-authority>, last visited on 1-10-2016.

¹⁵ Under WTO law (Article XX of the GATT 1994 and Article XIV of the GATS) there are some general exceptions which are: the national and international security exceptions (Article XXI of the GATT 1994 and Article XIV bis of the GATS), the safeguard measures exceptions (Article XIX of the GATT 1994 and the Agreement on Safeguards), the balance of payments measures the exceptions (Articles XII and XVIII:B of the GATT 1994 and Article XII of the GATS), the regional trade agreements exceptions (Article XXIV of the GATT 1994 and Article V of the GATS) and the economic development exceptions (which are set out in 'special and differential treatment' provisions and the 'Enabling Clause'). See Van den Bossche and Prévost (2016), p. 84.

¹⁶ Under Article XVI:5 of the WTO Agreement: 'No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements.' As the DSU has not accepted any reservation, no reservation can be formulated to this legal instrument which is annexed to the WTO Agreement.

The above needs to be discussed in detail to draw parallels between this case and the domestic restrictions under Iran's Principle 139 of the Constitution on the settlement of disputes. It is argued that the restrictions provided in Principle 139 have a direct link to the national interest and security of Iran. It bears considering that the United States introduced broad interpretations¹⁷ concerning its national security and its relevance to the embargos and restrictions and also their legal and financial consequences with regard to other WTO Members. However, in comparison to what was done by the US in the *Helms-Burton Act* dispute, the restrictions stated by Principle of 139 of Iran's Constitution are, to me, much more clear and their legitimacy under WTO law does not need such a broad interpretation or justification as provided by the general exceptions of the GATT 1994, in order for Iran to use it as a justification on the basis of national security and interest, even though it is unlikely that Article XXI of the GATT or Article XIV bis of the GATS can be invoked to justify the non-acceptance of the jurisdiction of a properly established panel.

On 11 April 1997, the complainant, the EU, requested the Panel to suspend its work. Suspension under Article 12.12 of the DSU is not a matter on which parties (have to) agree. The Memorandum of Understanding was a purely political document which committed the US to explore possibilities not to implement the *Helms-Burton Act*. This suspension continued until the Panel's jurisdiction lapsed on 22 April 1998. Just afterwards, Senator Helms from United States said:

I have a message for our friends in Canada and Mexico: Take no comfort from these negotiations, ... no matter what their outcome, unless and until you stop trafficking in stolen American property in Cuba, (U.S. sanctions) will continue to apply to you.¹⁸

Further discussions on reservation are presented later in this chapter in section 7.3.1. (Reservation).

¹⁷ The United States of America did not refer to the National Security, stated in the GATT Agreement, because it (the US) believes in a broader interpretation of that term.

¹⁸ See: ICTSD, "EU-U.S. Strike Helms-Burton Deal," *Bridges Weekly Trade News Digest*, 14 April 1997, available at <http://www.ictsd.org/bridges-news/bridges/issue-archive/eu->

Finally in the G8 summit meeting on 18 May 1988, the parties concluded an agreement. Under this deal, the United States accepted to remove threats to European companies under the *Helms-Burton Act* in exchange for a commitment from the European Community to a policy of stricter international action and cooperation regarding illegal expropriations.¹⁹

Independent of the above example, there is at least one precedent concerning the 'national security' in the GATT 1947 dispute settlement system, Nicaragua's complaint against the United States embargo in the GATT 1947 in which the United States defended its embargo invoking its national security justification. The GATT Panel decided in this dispute that:

It could not find the United States to be in compliance with its obligations under GATT, nor could it find the United States to be failing to comply.²⁰

In this case, the Panel did not find any violation and, therefore, the United States' interpretation is that the Panel adopted all of its assertions concerning the national security defense.²¹ It bears mentioning that the Panel could not rule because of its terms of reference, which had been agreed between the US and Nicaragua. To conclude, the US has invoked the national security justification in one case to deny the jurisdiction of the WTO DSS to adjudicate a dispute. No other WTO Member has ever done the same, and neither do they agree that the US was correct in doing so. Therefore, any Member can only invoke Articles XX and XXI of the GATT and Articles XIV and XIV bis of the GATS to justify otherwise GATT/GATS inconsistent measures. However, it is unlikely that, by invoking these articles, Iran can escape the jurisdiction of the WTO DSS.

[us-strike-helms-burton-deal-wto-panels-set-for-canada-india](#), last visited on 1-10-2016, p. 1.

¹⁹ See S. Smis and K. van der Borgh, "The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts", *The American Journal of International Law* (1999) 93, p. 229.

²⁰ See the un-adopted GATT Panel Report, *U.S.-Trade Measures Affecting Nicaragua*, Oct. 13, 1986, GATT Doc. L/6053, available in 1986 WL 363154.

²¹ J.A. Spanogle, "Can Helms-Burton be Challenged Under WTO," Spring 1999, p. 1330, available at <https://www.ft.com/content/e820f5cc-b2db-11e5-b147-e5e5bba42e51>, last visited on 1-10-2016.

Another mechanism which is usually used by countries in their accession to international agreements is reservation. This mechanism is presented below.

7.3. Suggestions According to the WTO Law to Observe Principle 139

The World Trade Organization has a dispute settlement system which, according to Article III:3²² of the WTO Agreement, is an associated legal instrument included in Annex 2 of this Agreement. To join the WTO, Iran needs to accede to all agreements and associated legal instruments included in Annexes 1, 2 and 3 of the WTO Agreement, including the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).²³ However, Principle 139 of Iran's Constitution includes restrictions on the settlement of international disputes. Under these restrictions, the settlement of disputes with non-Iranians on state and public properties shall be authorized by Parliament. Examining how the mentioned constitutional restrictions can be observed by Iran, its practice on enforcement of this Principle is briefly discussed below to suggest ways to facilitate its WTO accession.

7.3.1. Reservation

Article 2(d) of the *Vienna Convention of the Law of Treaties* (1969) includes a definition for a reservation:

'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.²⁴

²² Article III:3 of the WTO Agreement states: 'The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.'

²³ Article II:2 of the WTO Agreement states: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements").'

²⁴ Article 2(d) of the Vienna Convention of Law of Treaties (23 May 1969).

Therefore, the legal effect of a treaty regarding a state can be excluded or modified through a reservation. However, under Article 19 of the mentioned convention, if ‘the reservation is prohibited by the treaty’²⁵ or the treaty provides that only specified reservations, which do not include the reservation in question, may be made’;²⁶ or ‘the reservation is incompatible with the object and purpose of the treaty’,²⁷ no reservation can be accepted under international law.

This is also accepted by Iran’s Guardian Council, as discussed in chapter four.²⁸ The Guardian Council, in its opinion no. 83/30/9593 dated 9 February 2005, states that: ‘Considering that Article 27 of the Convention has explicitly stated that no reservation can be accepted to this Convention, therefore, the formulated reservation is not effective and due to this respect, acceptance of the convention is in conflict with Principle 139 of the Constitution.’²⁹

To remove the legal impediment – as discussed in previous chapters – from its accession to the WTO, an important question arises as to whether Iran can formulate a reservation to the WTO DSU as a solution. This question is taken under close consideration after a short discussion on the practice of Iran’s Parliament in dealing with international agreements including dispute settlement mechanisms.

7.3.1.1. *Reservations to Agreements including Dispute Settlement Mechanisms*

As a result of enforcing Principle 139 by Iran’s Parliament, a practice has been established. This practice can suggest how the Parliament may deal with Iran’s protocol of accession to the WTO. As discussed in chapter four,³⁰ the practice of Iran’s Parliament is mostly based on establishing a reservation. In the

²⁵ Paragraph (a) of Article 19 of the *Vienna Convention of Law of Treaties*.

²⁶ Paragraph (b) of Article 19 of the *Vienna Convention of Law of Treaties*.

²⁷ Paragraph (c) of Article 19 of the *Vienna Convention of Law of Treaties*.

²⁸ See chapter 4, section 4.4.4. (Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?).

²⁹ This opinion of the Guardian Council was issued on accession of Iran to the *Stockholm Convention on Persistent Organic Pollutants* (22 May 2001). (Translation S.A), Article 27 of the Convention states: ‘No reservations may be made to this Convention.’, <https://treaties.un.org>, last visited on 1-10-2016.

³⁰ See chapter 4, section 4.4.4. (Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?)

adoption process of accession to multilateral and bilateral agreements, Iran's Parliament usually formulates different kinds of reservations.³¹ These reservations can be categorized into two main groups: rejecting the dispute settlement provisions (1) or conditional acceptance of dispute settlement provisions (2).

(A) Rejecting the dispute settlement provisions

Based on the method of reservation, Iran usually drafts some stipulations which are annexed to the beginning of the multilateral or bilateral agreements. These sentences explicitly reject any sort of obligation and responsibility for Iran with regard to a part or the whole of the dispute settlement provisions in that document. For example, in approving the accession to the *International Convention against the Taking of Hostages* (1979),³² the reservation on dispute settlement was included as follows:

Pursuant to Article 16, paragraph 2 of the *International Convention against the Taking of Hostages*, the Government of the Islamic Republic of Iran declares that it does not consider itself bound by the provisions of Article 16, paragraph 1 of the Convention regarding the reference of any dispute concerning the interpretation, or application of this Convention...³³

Another example is the *International Convention on the Harmonization of Frontier Controls of Goods* (1982).³⁴ The reservation made by the Parliament of Iran states that:

³¹ It bears mentioning that under the international rules on treaties, no reservation can be formulated with regard to bilateral agreements. However, if Iran's Parliament adds any sentences to a multilateral agreement, it should be renegotiated by the Government with the other party of that agreement.

³² This Convention, which was adopted on 17 December 1979 and entered into force on 3 June 1983, has 168 parties. For further information see the United Nations internet site on treaties at: <http://treaties.un.org>, last visited on 1-10-2016.

³³ Ibid. (Translation S.A).

³⁴ *The International Convention on the Harmonization of Frontier Controls of Goods* Which was adopted on 21 October 1982 and entered into force on 15 October 1985, has 56 parties. For further information see the United Nations internet site on treaties at: <http://treaties.un.org>, last visited on 1-10-2016.

... pursuant to Article 21, paragraph 1, of the Convention, the Islamic Republic of Iran does not consider itself bound by the provisions of Article 20, paragraphs 2 to 7, concerning the settlement of disputes.³⁵

Therefore, under the mentioned statements, Iran has excluded itself from the dispute settlement mechanisms of some international agreements. As presented below, by formulating reservations, Iran can also conditionally accept international agreements.

(2) *Conditional acceptance of dispute settlement provisions*

Sometimes Iran's Parliament makes the application of dispute settlement provisions dependent on the observance of the Principle 139 of the Constitution. In some of these reservations, the terms of Principle 139 are clearly stated. For instance, in approving the accession of Iran to the *Preferential Trade Agreement (PTA) among D-8 Member States* (2006),³⁶ the Parliament formulated the following reservation.

The Application of Article 26 of this Agreement by Islamic Republic of Iran concerning referral to arbitration is subject to observance of the Principle 139 of Iran's Constitution.³⁷

However, the Parliament has also made some reservations in which there is no explicit reference to the Principle 139 and instead it uses general terms, which implicitly include the requirements of Principle 139. Some of the general terms used as reservations by Iran's Parliament are as follows:

- 'In accordance with the Constitution of the Islamic Republic of Iran and related domestic law' which is used for example in reservation to *United Nations Convention against Corruption* (2003):³⁸

³⁵ Ibid. (Translation S.A).

³⁶ *Preferential Trade Agreement (PTA) among D-8 Member States* was adopted in August 2006 and entered into force on 25 August 2011. For further information see the internet site of D-8 at: <http://www.developing8.org>, last visited on 1-10-2016.

³⁷ (Translation S.A).

³⁸ This Convention which was adopted on 31 October 2003 and entered into force on 14 December 2005, has 159 parties. See <http://treaties.un.org>, last visited on 1-10-2016.

The Government of the Islamic Republic of Iran affirms that the consent of all parties to such a dispute is necessary, in each individual case, for the submission of the dispute to arbitration or to the International Court of Justice. The Government of the Islamic Republic of Iran can, if it deems appropriate, agree with the submission of the dispute to arbitration in accordance with the Constitution of the Islamic Republic of Iran and related domestic law.³⁹

- The wording 'in conformity with the Constitution of the Islamic Republic of Iran and relevant domestic rules and regulations' is also used to make reservations to agreements such as the *Intergovernmental Agreement on the Trans-Asian Railway Network* (2006):⁴⁰

Pursuant to Article 13, paragraph 5, of the *Intergovernmental Agreement on the Trans-Asian Railway Network*, the Government of the Islamic Republic of Iran declares that any dispute between the Government of the Islamic Republic of Iran and other States Parties relating to the interpretation or application of this Agreement shall be settled in conformity with the Constitution of the Islamic Republic of Iran and relevant domestic rules and regulations.⁴¹

'In accordance with its related domestic law' is used for various documents such as the *United Nations Convention on Jurisdictional Immunities of States and their Property* (2004):⁴²

The Government of the Islamic Republic of Iran affirms that the consent of all parties to such a dispute is necessary, in each individual case, for the submission of the dispute to the International Court of Justice. The Government of the Islamic Republic of Iran can, if it deems appropriate, for the settlement of such a dispute, agree with the

³⁹ (Translation S.A).

⁴⁰ This Agreement, which was adopted on 12 April 2006 and entered into force on 11 June 2009, has 16 parties. Ibid.

⁴¹ (Translation S.A).

⁴² This Convention was adopted on 2 December 2004, but is not in force yet. This document has 13 parties. Ibid.

submission of the dispute to arbitration in accordance with its related domestic law.⁴³

It bears mentioning that the term ‘in each individual case’ in some of the above-mentioned reservations reflects a similar term ‘in every case’ stated in Principle 139 of the Constitution. This shows how Iran’s Parliament has tried to emphasize its understanding of the mentioned Principle by means of a case-by-case approval approach.

In contrast to the above, Iran’s Government has sometimes followed a different practice which it applied, for example, to disputes in *Iran-United States Claims Tribunal*, even though it has been criticized, as discussed in chapter six,⁴⁴ by the Parliament. This practice is based on the *blanco* approval approach. According to this method, as mentioned earlier, regarding the Iran-United States Claims Tribunal, Iran’s Government received the Parliament’s authorization with regard to the arbitration mechanism in general. Even though the authorization was issued by the Parliament on the basis of the case-by-case approval approach to be followed by the Government, it was never requested. This practice of Iran’s Government is inconsistent with the wording of Principle 139 of Iran’s Constitution. However, this *blanco* approval approach is assumed to cause less impediments to Iran’s accession to the DSU than the case-by-case approval approach. In other words, this method could be used to obtain the Parliament’s approval on a single occasion. This approval would encompass the referral of all disputes to the WTO dispute settlement system. However, if used, the Guardian Council would send Iran’s protocol of accession to the Parliament because of its inconsistency with Principle 139 of the Constitution.

To conclude, observing the requirements of Principle 139 of the Constitution by Iran’s Parliament is usually performed through formulating reservations to multilateral agreements. The *blanco* approval approach is another method which occasionally has been used by Iran’s Government to refer public and state disputes with non-Iranians to dispute settlement systems. However, the

⁴³ (Translation S.A).

⁴⁴ See chapter 6, section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

question is whether the mentioned methods can remove the legal impediment to Iran's accession to the WTO. This is discussed below.

7.3.1.2. *Reservation to the WTO Dispute Settlement System*

Declaring reservations is the method which is usually applied by Iran's Parliament in implementing the requirements of Principle 139 of the Constitution with regard to multilateral dispute settlement systems. It is assumed that the Parliament would want to use the same method to approve Iran's accession to the World Trade Organization. However, this is complicated due to Article XVI:5 of the WTO Agreement (*Agreement Establishing the WTO*). This article contains the prohibition on reservations to the WTO agreements. Article XVI:5 states:

No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.⁴⁵

This article not only bans any reservation to the WTO Agreement, it also restricts the reservations to other WTO agreements to the extent listed by each WTO agreement. The only WTO multilateral agreements which permit reservation are:

- *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* – Article 21 and paragraph 2 of Annex III;
- *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* – Article 18.2;
- *Agreement on Technical Barriers to Trade* – Article 15.1;
- *Agreement on Subsidies and Countervailing Measures* – Article 32.2; and
- *Trade-Related Aspects of Intellectual Property Rights (TRIPS)* – Article 72.

According to the *WTO Analytical Index of the Marrakesh Agreement*,⁴⁶ since 31 December 2004, no reservations have been made under the above mentioned

⁴⁵ WTO Agreement Establishing the World Trade Organization Article XVI: 5.

⁴⁶ WTO Analytical Index of the *WTO Agreement*, Paragraphs 234-235.

agreements. Further, the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* is not mentioned as an agreement for which a reservation can be made. Therefore, pursuant to Article XVI (5) of the *WTO Agreement*, and Article 19(a) and (b) of the *Vienna Convention on the Law of Treaties* (1969),⁴⁷ there is no reservation recognized for the WTO Dispute Settlement Understanding. Now, the question is how Iran's Parliament can guarantee compliance with the Principle 139 requirements, while a reservation to the Dispute Settlement Understanding is not allowed? This *per se* prohibition constitutes a very important impediment that can prevent or at least obstruct Iran's accession to the WTO.

Based on the definition of a reservation in the Article 2 (1)(d) of the *Vienna Convention on the Law of Treaties* (1969),⁴⁸ a reservation should "exclude' or 'modify' the legal effect of certain provisions of the treaty in their application"⁴⁹ as to the country making the reservation. However, it is arguable whether Iran's Principle 139 requirements on dispute settlement 'exclude' or 'modify' the legal consequences of the WTO Agreement on dispute settlement with regard to Iran and, accordingly, whether these requirements, if they were stated by Iran when acceding to the WTO, can be considered as reservations. This argument is discussed by Kaviani (2002)⁵⁰ who believes that the Iran's constitutional restrictions are a 'mere formality'.⁵¹ He asserts that the requirements stated by Principle 139 of Iran's Constitution do not oppose the substantial rules on dispute settlement and arbitration in contracts and treaties. In other words, he asserts that these requirements based on the domestic law of Iran are similar to the formalities in the

⁴⁷ Vienna Convention on the Law of Treaties (1969)- Article 19: 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty.

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made.'

⁴⁸ *Vienna Convention on the Law of Treaties* which was adopted on 23 May 1969 and entered into force on 27 January 1980 has 108 parties. For more information see: <http://untreaty.un.org>, last visited on 1-10-2016.

⁴⁹ Vienna Convention on the Law of Treaties (1969).

⁵⁰ Kourosh Kaviani is a trade law Professor in Alameh Taba Tabaei University, Iran.

⁵¹ K. Kaviani, "Principle 139 of the Constitution and Arbitration Clause in Agreements Approved by the Parliament [اصل 139 قانون اساسی و شرط داوری در قراردادهای مصوب مجلس شورای اسلامی]", *Research on Law and Politics Journal* [مجله پژوهش حقوق و سیاست] (2002), p. 138.

domestic law of many countries on finalizing, for example, the accession process of a country through its adoption by its Parliament. The requirement of the Parliament's approval for an accession, even though it is indeed required, is part of the formality recognized by all countries to be observed. For instance, a country can sign an agreement with another country, while its Parliament can reject the agreement. The main reason that can support this argument might be the legal consequences of the aforementioned requirements. According to what the proponent of this argument claims, if Iran's Parliament rejects the referral, the Iranian party as a 'complainant' cannot take a dispute to a dispute settlement system like the WTO. It bears considering that the discussions/argumentation to consider Principle 139 restrictions as a 'mere formality' are recognized neither by Iran's legal system, nor by the international rules on the law of treaties.

In addition, it bears noting that Principle 139 requirements have been given – at least in the opinion of these scholars – very little importance. Therefore, it can be asserted that, if the requirements of Principle 139 are indeed a 'mere formality', the problem of a conflict with WTO law, and in particular the compulsory jurisdiction of the WTO DSS, is not really a problem. However, if the requirements of Principle 139 can correctly be assumed to be a 'mere formality', it can be argued that this formality does not affect Iran's participation as a responding party *de facto*. In other words, Iran, as a responding party, would have the problem to recognize a Panel's report in its domestic legal system due to its constitutional rules. However, under the WTO agreements, Iran's non-participation or non-compliance would not be accepted.

Furthermore, Iran, as mentioned before, usually makes its reservations based on the discussed Principle to multilateral agreements and, if other countries do not object to these reservations (or formality), these requirements should be observed and Iran cannot participate as a responding party in a state or public property dispute with non-Iranians, if its Parliament rejects it. Due to the fact that they constitute constitutional rules from Iran's domestic legal perspective, these requirements are considered to be something more than a normal law. Even if Iran participates in such disputes, the final result of these disputes would be inconsistent with the requirements of its Constitution and unlikely to be accepted by Iran's legal system. In other words, if the requirements of Principle 139 of Iran's Constitution are violated, this can

result in the non-recognition of the final result of the relevant dispute under Iran's domestic legal system. For instance, if the result of a dispute requires an amendment to Iran's law or regulation, this would not be accepted by the Parliament, even though the winning party can apply the enforcement mechanisms of the WTO DSS against Iran. Therefore, from a legal perspective, the aforementioned discussed conflict still exists as an impediment to Iran's accession to the WTO, even though, from a pragmatic view, the impediment to the accession could be resolved.

It is worth noticing that there are some multilateral conventions to which Iran has made reservations based on Principle 139 of its Constitution. It is important to bear in mind that these conventions have explicitly prohibited any reservations. For example, Article 32 of the *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* (2003)⁵² has banned any kind of reservation:

No reservation may be made to this Convention.⁵³

However, in approving the accession, as Article 30 of the Convention includes some rules on dispute settlement methods, Iran's Parliament made a reservation based on Principle 139 of the Constitution. That reservation provides:

Compliance with the Principle 139 of Islamic Republic of Iran's Constitution in applying this Convention is obligatory.⁵⁴

Another example is the reservation that Iran made to the *International Convention on the Harmonized Commodity Description and Coding System* (1983),⁵⁵ even though any reservation is banned pursuant to Article 18 of the

⁵² The *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* which was adopted on 4 November 2003 and entered into force on the 12th August 2006, has 5 parties which are the Caspian littoral states. For further information see: <http://www.caspianenvironment.org/newsite/Convention-FrameworkConventionText.htm>, last visited on 1-10-2016.

⁵³ Ibid.

⁵⁴ (Translation S.A). For further information see the website of Iran's Parliament at: <http://rc.majlis.ir/fa/law/show/97758>, last visited on 1-10-2016.

⁵⁵ The *International Convention on the Harmonised Commodity Description and Coding System* which was adopted on 14 June 1983 and entered into force on 01 January 1988, has 116 parties. For further information see:

Convention.⁵⁶ Iran's reservation was made on Article 10(4) of the Convention, which concerns dispute settlement. This reservation declares:

Application of Article 10(4) of this Convention with regard to Iran is dependent on compliance with the Principle 139 of Islamic Republic of Iran's Constitution.⁵⁷

This practice of Iran, which is so far not objected to by other countries, can lead to a clear conclusion. This is due to the legal nature of the requirements stated in Principle 139 of Iran's Constitution as being a 'mere formality' in its accession to the multilateral conventions, Iran can emphasize its compliance with those requirements, even though a reservation is not allowed. In other words, according to Iran's practice with regard to its accession to the multilateral conventions, it can be argued that Iran can accede to the World Trade Organization, while emphasizing its constitutional requirements with regard to the WTO dispute settlement system, although no reservation is permitted. However, it needs further discussion regarding whether such reservations that have not been accepted by the other parties to the treaty would have legal value or significance in the case of a dispute.

Nevertheless, it can be argued that these domestic restrictions should be considered to be effective solely in Iran's participation as a complainant in the WTO dispute settlement system. In other words, why would Iran not be able to invoke these restrictions for its non-participation as a responding party? Although the scope of the restrictions should be limited to affect just Iran, which is obliged in order to observe the domestic rules, the practice of Iran in its accession to multilateral conventions does not include any restriction in this regard. Otherwise, it would have been mentioned in its reservations or would have been criticized or opposed by other countries. Accordingly, it can be suggested that Iran's practice on the mentioned restrictions based on its constitutional rules can be continued in the accession of Iran to the World

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=512>, last visited on 1-10-2016.

⁵⁶ International Convention on the Harmonized Commodity Description and Coding System Article 18 provides: '*No reservations to this convention shall be permitted.*' Ibid.

⁵⁷ (Translation S.A). For further information see: <http://rc.majlis.ir/fa/law/show/92442>, last visited on 1-10-2016.

Trade Organization, even though achieving the necessary consensus, as discussed below in this chapter, for Iran's accession to the WTO is likely to be difficult. However, it should be taken into consideration that this method cannot remove the legal impediment resulting from the conflict between Principle 139 of Iran's Constitution and WTO DSU. This is also due to, as mentioned before, the opinion⁵⁸ issued by the Guardian Council which does not recognize reservations if they are not allowed by the relevant international agreement.⁵⁹ However, if a consensus under WTO law among WTO Members, as discussed below, authorizes Iran's reservation, the reservation will also be recognized under Iran's legal system. How such a consensus can be achieved is discussed in the subsequent section.

It bears considering that this solution (consensus) is different from applying a waiver. Under Article IX of the WTO Agreement, there are some requirements for the adoption of a waiver, among which is a limited duration:

A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.⁶⁰

The Appellate Body has also noted this requirement in the compliance proceedings of the EC – Bananas III dispute: 'Article IX:4 requires that the decision granting the waiver state the date on which the waiver shall terminate, thus ensuring that waivers are granted for limited periods of time.'⁶¹

As the waiver needs to be for a limited period of time, if it is granted to Iran with regard to the compulsory jurisdiction of the WTO DSS, Iran's accession

⁵⁸ The Guardian Council's opinion no. 83/30/9593 dated 9 February 2005 states that: 'Considering that Article 27 of the Convention has explicitly stated that no reservation can be accepted to this Convention, therefore, the formulated reservation is not effective and due to this respect, acceptance of the convention is in conflict with Principle 139 of the Constitution.' (Translation S.A).

⁵⁹ See chapter 4, section 4.4.4. (Can Iran Formulate a Reservation to Remove the Conflict in its Accession to the WTO (DSU)?).

⁶⁰ Article IX:4 of the WTO Agreement.

⁶¹ The WTO Appellate Body Report, EC - Bananas III (Article 21.5 - Ecuador II) /EC-Bananas III (Article 21.5 - US), para. 380.

protocol will be considered by the Guardian Council to be inconsistent with the Constitution. Therefore, granting such a waiver to Iran cannot remove the legal impediment to Iran's WTO accession. Whether a consensus under WTO law can remove this impediment is discussed below.

7.3.1.3. *Consensus under WTO Law*

As mentioned above, there are some impediments to Iran's accession to the World Trade Organization. A part of the legal impediment discussed above relates to Iran's constitutional requirement rules on the settlement of state and public disputes. It was also analyzed that, under WTO law, formulating a reservation with regard to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) is not accepted. Analyzing Iran's constitutional requirements as a 'mere formality' is one suggestion which was proposed with regard to the problem of accession but which is viewed to be beyond the legal aspect of WTO accession process. There is also one solution under WTO law which can remove the discussed impediment through WTO law and will be briefly discussed below. A possible parallel can be drawn between this solution and the solution analyzed earlier. Article XII:I of the WTO Agreement states:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

Under Article XII:I, a country may accede to the WTO on terms agreed between it and the WTO. There is nothing provided in this article and other relevant WTO agreements to restrict this agreed term to the WTO agreements. In other words, all matters regarding trade related issues can be negotiated and agreed upon.

There is a paragraph in section I (2) of the protocol of accession of a country which wants to accede to the WTO which provides:

Protocol of accession Part I (2): This Protocol...shall be an integral part of the WTO Agreement.⁶²

This paragraph states that whatever is agreed between the WTO Members and acceding countries during the accession process will be regarded as part of the WTO agreements after adoption of the protocol in the WTO General Council. Pursuant to the decision of the General Council on 15 November 1995 with regard to the *Decision-Making Procedures under Articles IX and XII of the WTO Agreement*,⁶³ the General Council adopts a protocol of accession through consensus. Therefore, if a protocol is reached by consensus, it will be an integral part of the WTO agreements. Accordingly, Iran's formalities on the settlement of state and public properties can also be negotiated to be part of Iran's accession protocol. If this protocol reaches a consensus in the WTO General Council, the discussed legal impediment of Iran's accession to the WTO will be removed. In other words, if the WTO Members adopt something by consensus, it will become a part of the WTO agreements.

The important question is whether WTO accession applicants' concerns, such as the conflict between Iran's Constitution and WTO multilateral agreements, can be accepted by WTO Members. It bears considering that if there is an impediment to the accession of a country to the WTO, it can be agreed between an acceding country and the WTO to ignore/disregard such an inconsistency with WTO law. One instance which has been agreed among the WTO Members is the Saudi Arabia's accession.

In Saudi Arabia's accession, there was a 'negative list' added to Annex C of Saudi Arabia's protocol of accession as exceptions to Saudi Arabia's trade regime due to the 'preservation of religious values and principles and provision of national security'.

⁶² See protocols of accession on the WTO website at: http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm, last visited on 1-10-2016.

⁶³ See the WTO Analytical Index of Marrakesh Agreement on the WTO website at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm, last visited on 1-10-2016.

Saudi arabia stated in this regard that foreign investment was permissible in all activities, except a short "Negative List", which would be revised and shortened periodically.⁶⁴

This 'negative list', which includes a list of exceptions to trade, was adopted by the General Council as part of Saudi Arabia's accession protocol. Therefore, this can also be a solution to remove Iran's legal impediment to its WTO accession. However, it is questionable whether a similar consensus can be attained to remove Iran's accession legal impediment. Since its very beginning, Iran's accession process has been marked by a lack of consensus support among WTO Members. As discussed in chapter 1, Iran applied for WTO accession in 1996. However, this application was not put on the agenda of the General Council to be discussed until 2005. There were no successful consensus-building attempts in the General Council and Iran's application was blocked several times by countries like United States up to when the Paris Agreement was concluded on 14 November 2004. This political deal was between the EU₃ (Britain, France, and Germany) and Iran on the suspension of Iran's nuclear activities.⁶⁵ Accordingly, in February 2005, through the meetings between the United States and the EU₃, the United States agreed to drop its objection to Iran joining the WTO. Therefore, on 26 May 2005, through a decision made in the WTO General Council, Iran was granted observer status to the WTO.

However, after 2005 so far, there has not been any considerable progress in Iran's accession process. To agree upon Iran's WTO accession legal impediment, further consensus-building activities are required between the

⁶⁴ See Paragraph 57 of the Report of the Working Party on the Accession of Saudi Arabia to the WTO. WTO Document: WT/ACC/SAU/61, 1 November 2005.

⁶⁵ This deal also includes a provision on Iran's WTO accession which states: 'Once suspension has been verified, the negotiations with the EU on a Trade and Cooperation Agreement will resume. The E₃/EU will actively support the opening of Iranian accession negotiations at the WTO'. For further informations see: Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris on 15 November 2004, INFCIRC/637, International Atomic Energy Agency, <http://www.iaea.org/sites/default/files/publications/documents/infcircs/2004/infcirc637.pdf>, last visited on 6-3-2017.

WTO Members. The experience of the aforementioned deal can, I think, lead us to this understanding that other agreements beyond the WTO would be needed to accelerate Iran's accession process. That is why the author posits the view that the recently achieved nuclear deal in 2015 (The Joint Comprehensive Plan of Action (JCPOA)) between China, France, Germany, Russia, the United Kingdom, the United States, the European Union (EU), and Iran would be helpful for a new consensus-building attempt by Iran. This deal also includes provisions on trade cooperations. For instance, The United Nations Security Council Resolution 2231 on Endorsing the JCPOA states:

Emphasizing that the JCPOA is conducive to promoting and facilitating the development of normal economic and trade contacts and cooperation with Iran, and having regard to States' rights and obligations relating to international trade.⁶⁶

The hope is that Iran can enjoy the capacity that the deal has provided for further progress in its WTO accession process. It bears mentioning that the exception regarding the compulsory jurisdiction of the WTO DSS sought by Iran is on the basis of its 'national security'. It can therefore be suggested, that in its accession to the WTO, Iran continues its practice which is recognized at the international level by other countries with regard to its constitutional rules on dispute settlement. Then, if consensus is reached, i.e. no objection is declared to the mentioned domestic restrictions, its protocol of accession could be adopted.

To conclude, reaching a consensus on removing the legal impediments to Iran's WTO accession is unlikely to be easy. However as discussed, it can be sought through capacities, such as the political deals beyond the WTO framework.

Under WTO law, 'opt-out(non-application)' is a mechanism which – under some conditions – can be used by a WTO Member to postpone or stop its trade relations with another Member. To see whether this method can be helpful in removing Iran's legal impediment to its WTO accession, the opt-out is discussed below.

⁶⁶ UNSC Resolution 2231, S/RES/2231, 20 July 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2231.pdf, last visited on 10-3-2017.

7.3.2. Non-Application

Another argument is whether, in accession to the WTO, Iran can comply with the Principle 139 requirements of its Constitution through a 'non application clause'?⁶⁷

The WTO Agreement has provided a facility for its Members in the form of a non-application clause (opt-out) (Article XIII). This clause is either invoked by the new Member or a current Member against a current Member or the new Member respectively. If invoked, none of the WTO agreements apply in the relationship between the new and current Member, even though it has not been used very often. The non-application clause is briefly discussed below to determine whether it can remove Iran's legal impediment to the WTO accession.

The opt-out (non-application) clause was first provided for in Article XXXV of the GATT 1947.⁶⁸ Under Article XXXV of the GATT 1947, a prior or a new Member could opt out of a GATT relationship once with regard to a new Member. This provision was founded in order not to oblige a Contracting Party to enter into a trade agreement with another country without its consent.⁶⁹ This right was used on 70 occasions, among which 50 were invocations against Japan when becoming a GATT Member. There was also a bilateral declaration that did not directly refer to Article XXXV GATT 1947. This declaration was a non-application clause which was not required to be applied to a new acceding country. The Declaration of 27 September 1951 on the 'Suspension of Obligations between Czechoslovakia and the United

⁶⁷ For political or other reasons (including economic reasons), certain Members may not want the WTO rules to apply between them. Van den Bossche (2008), p. 118.

⁶⁸ Article XXXV of the GATT 1947 Agreement states: '1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application. 2. The Contracting Parties may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.'

⁶⁹ Contracting Parties, GATT/1/SR.7, Summary Records of the Seventh Session, 15 March 1948, 5. Similar *Jackson*, International Economic Relations, 235, stating that 'it was felt that no country should be forced to accept a trade agreement with another country without its own decision to do so'.

States under the Agreement' stated that the governments of both countries were free to suspend their mutual obligations under GATT 1947 with respect to the other and any measures taken between the two countries would not modify the obligations of either government under the GATT 1947 towards third parties.⁷⁰ In 1992, this Declaration was announced to be 'no longer operative' by the GATT General Council.⁷¹ The WTO Contracting Parties decided to include a provision to prohibit a Member from invoking Article XIII:1 against existing Members. This is embodied in Article XIII:2 of the WTO Agreement:

Paragraph 1⁷² may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.⁷³

What this means is that the opt-out clause under Article XIII applied only between WTO Members that were previously GATT Contracting Parties to the extent that the opt-out clause under Article XXXV GATT 1947 had applied.

There were seven invocations of effective non-application cases before the entry to force of the WTO Agreement:⁷⁴

- three against Japan (by Botswana, Haiti and Lesotho);⁷⁵
- two against Israel (by Morocco and Tunisia);⁷⁶ and
- two against Hungary and Romania (by United States).⁷⁷

⁷⁰ Suspension of Obligation between Czechoslovakia and the United States under the Agreement, Declaration of 27 September 1951, BISD 11/36.

⁷¹ D. Tarr, "Russian WTO Accession: What has been Accomplished, What Can be Expected," Policy Research Working Paper: 4428 (The World Bank Publications, 2007), available at <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-4428>, last visited on 1-10-2016, p. 11.

⁷² Paragraph 1 of Article XIII of the WTO Agreement states: 'This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.'

⁷³ Article XIII:2 of the WTO Agreement.

⁷⁴ GATT Analytical Index II, 1034; WT/ACC/10/Rev.2.

⁷⁵ Ibid.

⁷⁶ Ibid.

Under paragraph 3 of Article XIII of the WTO Agreement, the non-application clause against acceding countries shall be notified to the Ministerial Conference/General Council before the accession is approved. Paragraph 4 of this Article states that, if a WTO Member requests, the Ministerial Conference/General Council can review the operation of Article XIII on an individual basis; it is not a matter of whether the requesting Member is directly affected. The Ministerial Conference's (or General Council's) recommendations in this regard are not binding.⁷⁸ The non-application regarding a Plurilateral Agreement is subject to the provisions of that Agreement.⁷⁹ The non-application is reciprocal.⁸⁰ Since 1995, this clause has been used 11 times,⁸¹ two of which are still operative.⁸² The United States has used this clause eight times against some acceding countries to the WTO. This is due to the so-called Jackson-Vanik Amendment (Title IV of the Trade Act of 1974 of United States), which states that most communist or non-market-economy countries were denied MFN status unless they fulfilled freedom-of-emigration⁸³ conditions as contained in Section 402.⁸⁴ Removal

⁷⁷ Ibid.

⁷⁸ Wolfrum, Stoll, and Kaiser (2006), p. 156.

⁷⁹ Article XIII:5 of the WTO Agreement.

⁸⁰ A. Aslund, S. Guriev, and A. Kuchins, *Russia After The Global Economic Crisis* (Peterson Institute for Internal Economics, 2010), p. 215.

⁸¹ Some of the invocations are: United States against: Romania (1995), Mongolia (1996), Kyrgyz Republic (1998), Georgia (1999), Moldova (2001), Armenia (2002), Vietnam (2006), and Russian Federation (2011). And by El Salvador against China (2001), by Turkey against Armenia (2002) and by Russian Federation against United States (2011). See the WTO Analytical Index: Marrakesh Agreement Establishing the World Trade Organization, Article XIII.

⁸² The invocations against Armenia (by Turkey – WT/L/501- 29 November 2002) and against China (by El Salvador – WT/L/429- 5 November 2001).

⁸³ In response to the sharp increase in the number of Soviet Jews seeking to leave the Soviet Union, the Brezhnev regime imposed a prohibitively expensive exit tax on Jews who wanted to leave. In response, Senator Henry Jackson of the State of Washington introduced an amendment to the Soviet-American Trade Bill, linking the trade benefits Moscow wanted (most favored nation treatment for Soviet exports and US credits) to the exodus of Soviet Jews. Jackson's amendment quickly got support in Congress, as Representative Charles Vanik of Ohio introduced a similar amendment in the US House of Representatives. See <http://www.encyclopedia.com/doc/1G2-3404100609.html>, last visited on 1-10-2016.

⁸⁴ In 1951, the United States suspended MFN status of all communist countries (except Yugoslavia) under Section 5 of the Trade Agreements Extension Act. That provision

of a country from the Jackson-Vanik restrictions requires US Congress to pass legislation.⁸⁵

Regarding Iran's accession to the WTO, there would be some countries which do not have trade relations with Iran and Article XIII gives them and also Iran this capability to avoid entering into a trade agreement with each other. For instance, under an Israeli regulation (the Trading with The Enemy Ordinance (1939)),⁸⁶ any commercial or investment activity with Israel undertaken by entities located in Iran, Iraq, Lebanon, Libya, Syria, and Yemen is prohibited.⁸⁷ Iran was added to the enemies list by the finance ministry in 2007, grouped with the countries that sent troops to oppose Israel's establishment in 1948: Syria, Lebanon, Iraq, Saudi Arabia, and Yemen. (The original Members Egypt and Jordan were removed after signing peace treaties

was superseded by Title IV of the Trade Act of 1974. Section 401 of Title IV requires the President to continue to deny non-discriminatory status to any country that was not receiving such treatment at the time of the law's enactment on 3 January 1975. In effect, this meant all communist countries, except Poland and Yugoslavia. Section 402 of Title IV, the so-called Jackson-Vanik amendment, denies the countries eligibility for NTR status as long as the country denies its citizens the right of freedom of emigration. These restrictions can be removed if the President determines that the country is in full compliance with the freedom-of-emigration conditions set out under the Jackson-Vanik amendment. The Jackson-Vanik amendment also permits the President to waive full compliance with the freedom-of-emigration requirements if he determines that such a waiver would promote the objectives of the amendment, that is, encourage freedom of emigration. While Title IV addresses only freedom of emigration, Congress has used the law to press the subject countries on a number of economic and political issues. The removal of a country from Jackson-Vanik restrictions requires Congress to pass legislation. W.H. Cooper, "The Jackson-Vanik Amendment and Candidate Countries for WTO Accession: Issues for Congress," *CRS Report for Congress Prepared for Members and Committees of Congress* (Congressional Research Service, Library of Congress, 2012), p. 5.

⁸⁵ Cooper (2012), *ibid*.

⁸⁶ The British Trading with the Enemy Act 1939 was applied to Mandatory Palestine, as to other British-ruled territories. On the creation of Israel in 1948, it was retained as an Israeli law and the various Arab countries named in it as "The Enemy". It is still in force as of 2013, though Egypt and Jordan were removed from its application with the respective peace agreements Israel signed with them. See: <http://www.hfn.co.il/files/33644eb87c7b31fec816c438bc737c55/pdfFiles/WorldECR%20Issue%20-%20Israeli%20Sanctions.pdf>, last visited on 1-10-2016.

⁸⁷ See <http://www.clearstream.com/luxcsd-en/products-and-services/market-coverage/middle-east-and-africa/israel/investment-regulation---israel/6542>, last visited on 1-10-2016.

with Israel and 1979 and 1994). In addition, the Knesset in 2008 passed a law⁸⁸ barring Israeli financial institutions from investing in firms that do substantive business with Iran.⁸⁹

Iran's Parliament has also adopted some legislation on the prohibition of any relationship with Israel. For instance, Article 8 of the *Law on Supporting the Islamic Revolution of Palestine's People* states: 'Any economic, trade, cultural relation with the Zionists-related companies and associations in the world is prohibited.'⁹⁰

Also, Saudi Arabia is another country which would probably be unwilling to have trade relations with Iran. This is due to the increasing political and also oil-based tensions between the two countries during recent years which have resulted in all political and trade relations ceasing.⁹¹

To conclude, as making reservations to the WTO DSU is not permitted, it was assumed that the non-application clause can be used by Iran to facilitate and accelerate its WTO accession through opting out of the compulsory jurisdiction of the WTO DSS. However, as discussed, this facility is subject to certain conditions and can only applied with regard to a limited number of WTO Members. In other words, Iran cannot use the non-application clause in relation to all WTO Members in its accession. More importantly, if the non-application clause is invoked, no single provision of the WTO Agreement applies. One cannot invoke the non-application clause for specific provisions

⁸⁸ Prohibition of Investment in Corporations That Maintain Business Contact with Iran Law and Bill, 5768-2008, the Knesset Website at: <http://www.loc.gov/law/foreign-news/article/israel-boycott-of-corporations-conducting-business-with-iran>, last visited on 1-10-2016.

⁸⁹ For further information see: <http://content.time.com/time/world/article/0,8599,2075452,00.html>, last visited on 1-10-2016.

⁹⁰ ماده 8 قانون حمایت از انقلاب اسلامی مردم فلسطین: هر نوع برقراری رابطه اقتصادی و تجاری و فرهنگی با [کمپانیها و مؤسسات و شرکتهای وابسته به صهیونیستها در سطح جهان ممنوع می‌باشد. (Translation S.A). For further information see: Iran's Parliament Research Centre website.

⁹¹ For further information see F Times, "The Folly of Saudi Arabia's Battle with Iran," 4 Jan 2016, available at <https://www.ft.com/content/e820f5cc-b2db-11e5-b147-e5e5bba42e51>, last visited 1-10-2016.

of the WTO agreements only. Therefore, the non-application clause cannot remove Iran's WTO accession legal impediment.

After the opt-out was introduced, it is briefly discussed below whether under Iran's legal system there is any practical solution to remove the legal impediment of Iran's WTO accession.

7.4. Suggestions Based on Iran's Domestic Legal System

Should all doors on the international level be closed, there are domestic law mechanisms to resolve the problems. Accordingly, there is a rule in the World Trade Organization system which states that all laws, regulations and administrative procedures of all Members should be consistent with the WTO agreements.⁹² There is a trend in the WTO system among a number of Members to induce a country in the accession process to amend its domestic law for full compliance with the WTO agreements. Reviewing a number of developing countries' accessions shows that the domestic law restrictions were available in the applicants' domestic law. However, to remove the accession impediments required that amendments were accepted and, therefore, the restrictions were removed. Accordingly, although the acceding countries amended their domestic law to be compatible with the multilateral trade system, they may have lost other benefits of their domestic restrictions beyond the WTO framework, for instance to avoid corruption in concluding contracts and resolving disputes.

Apart from this point, an amendment to the domestic law of a WTO acceding country is often an easy way but it is not always the best way. International arbitration awards with regard to Iran's state and public properties are perceived by Iranian scholars and the public at large as being unfair. Therefore, most Iranian scholars believe that supervisory powers, such as those contained in Principle 139 of Iran's Constitution, are very useful to prevent abuse. This was discussed in chapter five.⁹³

⁹² Article XVI:4 of the WTO Agreement provides: 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.'

⁹³ See chapter 5, section 5.3.6. (Doctrinal Interpretation).

It should also be mentioned that making amendments sometimes does not result in the long-term and sustainable development of a country and may not be the only solution for countries with different legal and economic systems. Therefore, according to the legal system of Iran, some solutions are suggested below which would resolve the problem while avoiding to amend the Principle 139 of Iran's Constitution.

There are a number of ways available in Iran's legal system which, instead of amending the rules of its Constitution, can be used to remove the conflicts/legal impediments. These ways are also stated in the Constitution. As regards the requirements of Principle 139 on dispute settlement, there are at least two ways available in the Constitution which can be used to remove the legal impediment. These ways are: Principle 112 (7.4.1) and Principle 110 (8) (7.4.2). Each one is discussed below.

7.4.1. Principle 112

Principle 112 of Iran's Constitution is also addressed as the Principle of the *National Exigency Council*.⁹⁴ The National Exigency Council was established and added to the Constitution due to conflicts occurring between the Parliament and the Executive.⁹⁵ Based on the Constitution, it has several powers and duties including: resolving the issues between the Parliament and the Guardian Council, making long-term strategies, etc. Regarding the disputes between the Parliament and the Guardian Council, Principle 112 provides:

The leadership orders the Expediency Council to meet in order to attend to cases where the Guardian Council finds legislation made by the Islamic Consultative Assembly in violation of the *Shariat* or the Constitution; the Assembly, with regard to the welfare of the system, does not sustain the opinion of the Guardian Council; or for consulting

⁹⁴ The National Expediency Council is to resolve the disputes between Iran's constitutional institutions, for instance on the basis of constitutionality. For further information on this Council, see chapter 3, section 3.5.5. (National Expediency Council).

⁹⁵ Also, one of the reasons for which the NEC was established is the disputes between the Parliament and the Guardian Council on constitutionality.

on affairs that the leadership will refer to the Expediency Council; or other duties that are mentioned in the Constitution.⁹⁶

According to this Principle and also Article 202 of the Parliament's Rules of Procedure,⁹⁷ a Parliament's approval, which is sent to the Guardian Council (Iranian Constitutional Court), if being inconsistent with the Constitution (or Islamic rules), must be sent back to the Parliament to be reviewed. Then, if the Parliament insists on its approval, or if it changes some part of its approval, it will be sent to the Guardian Council again. If the Guardian Council rejects the approval, the Head of the Parliament 'can' send it to the National Expediency Council to be examined as a dispute. After examining the issue, the National Expediency Council can approve it even though the approval can be inconsistent with the Constitution.

According to this method, there is no need to reform the principles of the Constitution due to the recognized expediencies being available in the country on a particular issue. That is why it is suggested that if it is not possible to formulate a reservation to the WTO DSU based on the requirements of Principle 139 of the Constitution or, if a consensus cannot be achieved on Iran's accession with regard to Iran's domestic restrictions, this problem is likely to be resolved through the mentioned method of Principle 112. In other words, one of the practical ways based on the domestic legal system of Iran to resolve the problem is to use the Principle 112 method.

According to this method, Iran's Parliament can approve Iran's protocol of accession to the World Trade Organization without formulating any reservation on dispute settlement. Then, if a conflict arises between the Parliament and the Guardian Council on the unconstitutionality of the protocol of accession, the protocol 'can' be sent to the National Expediency Council by the Head of the Parliament. Finally the National Expediency Council can approve it due to the expediency of the country on the basis of the WTO accession benefits for the national interest of the country. Although Iran's National Expediency Council usually does not refer to conflicts in its

⁹⁶ Principle 112 of Iran's Constitution.

⁹⁷ For the full text of Article 202 see Iran's Parliament website: <http://en.parliran.ir>, last visited on 10-3-2017.

approvals, it is implied that, when the Council adopts an approval, the conflict between the Parliament's approval and the Constitution is removed.

To conclude, on the basis of Iran's legal system, if the National Expediency Council adopts Iran's protocol of WTO accession, the legal impediment to Iran's accession to the WTO will be removed.

There are a number of bilateral and multilateral agreements approved under the Principle 112 of the Constitution by the National Expediency Council. Some of those agreements are mentioned in chapter 4.⁹⁸

It should be noted that the Parliament's approvals do not automatically go to the National Expediency Council and need to be sent under a special procedure and by the Head of the Parliament (or the President) based on necessary expediencies (national interest). The approvals of the National Expediency Council are higher in the hierarchy than the Parliament's approvals.

The solution under Principle 112 – which has worked very well regarding the adoption process of international agreements – can practically be the best way to remove the legal impediment. However, there is another method which can directly involve Iran's Leader in the adoption process to remove the legal impediment.

7.4.2. Principle 110 (8)

Another constitutional solution which can be used to resolve the discussed issue is the method stated in the Principle 110(8) of Iran's Constitution. Principle 110 (8) provides:

Resolving issues in the system that cannot be settled by ordinary means through the Expediency Council.⁹⁹

This method can be applied when there is a conflict between the main powers of the country including the 'Executive, Legislature and the Judiciary'. If other normal legal and constitutional methods are not able to resolve the conflict,

⁹⁸ See chapter 4, section 4.3.5.5. (International Agreements Adopted by the NEC).

⁹⁹ Principle 110 (8) of Iran's Constitution.

under this method it can be requested from the Leader to send the issue to the National Expediency Council to be examined. The result of this examination, as the Council's approval, shall be sent to the Leader and, if he approves, the result will be notified.¹⁰⁰

There are some differences between this method and the method under Principle 112. According to the Principle 110 (8) method, the National Expediency Council's approval shall be approved by the Leader to become final, otherwise it lacks any legal value, while under the method of Principle 112, the approval of the Council is *per se* valid and is directly sent to the Head of the Parliament to be notified as legislation.

The second difference is that the process does not need to be examined in the Parliament, Guardian Council, etc. If an issue is considered to be unresolvable through normal ways ('ordinary means'), it can be initially sent for example – as is usually the case – by the Head of the National Expediency Council to the Leader. Then the Leader is the person who can make the decision whether it must be examined by the National Expediency Council or not.

Another difference is that, under Principle 110 (8), the National Expediency Council, in exceptional cases, can issue legislation and, if the Leader approves the result, it can be notified as a law. In other words, this Council is also given the legislative task and the Guardian Council does not perform the constitutionality review.

It is worth mentioning that, so far, there is no bilateral or multilateral agreement that was to be examined by the National Expediency Council under the Principle 110 (8) method which was requested by the Leader. Nevertheless, this does not preclude that the accession of Iran to the World Trade Organization could be examined under Principle 110 (8) and be approved by the Leader, even though it is expected that the method under Principle 112 could work better in this case.

To conclude, requesting the Leader to send Iran's protocol of WTO accession to the NEC –even before it is submitted by the Government to the Parliament

¹⁰⁰ Article 26 of the Internal Regulation of the National Expediency Council. For more information see the NEC website.

for the adoption – and the adoption of this protocol by the NEC and then the Leader could remove the legal impediment to Iran's WTO accession.

7.5. Suggestions on the Basis of a Practical Interpretation of Principle 139 (No Conflict View)

As discussed in chapter six, in dealing with multilateral and bilateral agreements, Iran's Government has sometimes followed a *blanco* approval approach. Under this approach, after an agreement including a dispute settlement system is adopted by the Parliament, it is not required to get the Parliament's authorization in each individual case of the referral of a dispute to a dispute settlement system.¹⁰¹ However, this approach not only is different from the literal interpretation of Principle 139 and most other legal interpretations – such as the historical,¹⁰² authentic,¹⁰³ teleological,¹⁰⁴ and also doctrinal¹⁰⁵ interpretations – it is also different from the Parliament's case-by-case approval approach in the adoption process of international agreements.

It bears considering that, as discussed in chapter five,¹⁰⁶ under the no conflict view (due to the reasons such as: changes of time, mechanisms development in international and multilateral dispute settlement systems, international public order and practice, achieved purposes of the requirements stated by Iran's legal system, etc.) it can be asserted that there would be no conflict between Principle 139 and the WTO DSU in Iran's WTO accession. For instance, there can be no corruption in the WTO DSS proceedings and Members of Iran's Parliament can be adequately informed of any issues concerning people's properties. Therefore, the main purpose for which the 'Assembly of Experts for the Constitution' formulated the requirements of Principle 139 on dispute settlement is already achieved. It bears mentioning that, although the Parliament still has this right, based on the Principle 139 of the Constitution, to accept or reject the referral of a dispute to a settlement system, the Parliament, to the knowledge of this author, never rejected any

¹⁰¹ See chapter 6, section 6.2.2. (Iran's Government and Principle 139).

¹⁰² See chapter 5, section 5.3.2. (Historical Interpretation).

¹⁰³ See chapter 5, section 5.3.3. (Authentic Interpretation).

¹⁰⁴ See chapter 5, section 5.3.5. (Teleological Interpretation).

¹⁰⁵ See chapter 5, section 5.3.6. (Doctrinal Interpretation).

¹⁰⁶ See chapter 5, section 5.4.2. (No Conflict View).

referral to international, multilateral or bilateral dispute settlement mechanisms.

Under the authentic interpretation of Principle 139, if the WTO DSS has a judicial nature, there would be no conflict between the DSU and Principle 139. To establish whether this legal interpretation, as a solution, can remove the legal impediment, the nature of the WTO DSS is shortly examined below.

7.5.1. Quasi-Judicial

As discussed in chapter five,¹⁰⁷ Iran's Guardian Council has issued an interpretation¹⁰⁸ on Principle 139 of the Constitution which has exempted judicial international dispute settlement systems from the requirements of Principle 139. Therefore, if the mechanisms of the WTO DSS are of a judicial nature, in referring a dispute to this system, the Parliament's authorization would not be required. It bears mentioning that, under Principle 139 of Iran's Constitution, to refer a state or public property dispute with non-Iranians to an international dispute settlement system, it shall be authorized by the Parliament. However, due to the compulsory jurisdiction¹⁰⁹ of the WTO DSS, if a dispute is taken to the DSS against a Member, the responding country shall participate in the dispute settlement process.

As discussed in chapter two,¹¹⁰ the WTO DSS includes various mechanisms including judicial and arbitration. The DSS mechanisms are: consultations (to reach a mutually agreed solution); panel proceedings (adjudication); Appellate Body proceedings (adjudication); arbitration; good offices, conciliation and mediation. Therefore, the DSS, due to having judicial and non-judicial dispute settlement mechanisms, can be called a quasi-judicial system.

¹⁰⁷ See chapter 5, section 5.3.3. (Authentic Interpretation).

¹⁰⁸ Interpretation No. 7484 dated 01-01-1987 states that taking a claim (dispute) with regard to public and state property to (international) court does not fall within the scope of the Principle 139. It is also stated in this interpretation that Principle 139 is 'solely relevant to the settlement of claims relating to public and state property or its referral to arbitration'. (Translation S.A). For further information see the Guardian Council's website at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

¹⁰⁹ See chapter 2, section 2.3. (Nature of the WTO Dispute Settlement System (DSS)).

¹¹⁰ See chapter 2, section 2.3.7. (Quasi-judicial).

To conclude, the legal impediment resulting from the conflict between the DSU and Principle 139 of the Iranian Constitution cannot be removed through an interpretation which is issued by the Guardian Council.

Another reasoning to support the no conflict view is the practice in relation to Principle 139 by international arbitrations, which is very briefly mentioned in the subsequent section.

7.5.2. Iran-United States Claims Tribunal Experience

International tribunals have not adequately valued these domestic restrictions in several arbitrations. The reason, as discussed in chapter six,¹¹¹ is first that in some arbitrations,¹¹² domestic restrictions, such as Iran's requirements of Principle 139, were not accepted due to the principle of 'good faith'. Therefore, this practice has resulted in a new 'international public order' which does not recognize such domestic restrictions in international arbitrations.

One of the important international tribunals which also did not accept Iran's domestic restrictions, including the requirements of Principle 139, is the Iran-United States Claims Tribunal. This Tribunal is discussed in detail in chapter six.¹¹³ On 13 January 1981, Iran's Government addressed the adoption process of the 'Algiers Claims Settlement Declaration' and the referral of disputes to arbitration, and this approach could also be followed in Iran's WTO accession. In the adoption process of the *Algiers Declarations* in Iran's Parliament, a *blanco* approval approach was used.

However, it bears mentioning that the Bill of Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of America – which did not include the 'full text' of the *Algiers Declarations* – was adopted by the

¹¹¹ See chapter 6, section 6.3.1. (International Arbitrations).

¹¹² For instance, arbitrations awards, Arbitration Award No. 3896 of 30 April 1982 on the *Framatome v. Atomic Energy Organization of Iran (AEOI)*, and Arbitration Award No. 4381 of 1986 involved an Iranian State Company and a French Company. Both are discussed in section 6.3.1. International Arbitrations

¹¹³ See chapter 6, section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

Parliament. In addition, the Government convinced the Parliament that, in the referral of each dispute to arbitration, a case-by-case approval approach will be followed. That is why the Parliament adopted the bill and the Guardian Council did not take it as being inconsistent with Principle 139 of the Constitution. However, later when Iran's domestic law restrictions in two arbitrations¹¹⁴ invoked – including the requirements of Principle 139 – they were not accepted by the Tribunal due to the principle of 'good faith', the other party (United States) had not been adequately informed by Iran about the restrictions.

To conclude, the Iran-United States Claims Tribunal cannot be used as an example to support the no conflict view in Iran's accession to the WTO. Therefore, the legal impediment of Iran's accession to the WTO cannot be removed through this view on the basis of what was used in the adoption process of this arbitration Tribunal by Iran's constitutional institutions.

7.5.3. Similar Experience of Other Countries in Accession to the WTO

An examination of the countries that acceded to or are acceding to the WTO shows that, so far, there has not been such a similar case as Iran's accession (the legal conflict resulting from the inconsistency between the Constitution and the WTO DSS compulsory jurisdiction). However, there are some acceded and acceding countries which have amended their constitutions to join the WTO, among which are, for instance, the Russian Federation¹¹⁵ and

¹¹⁴ Arbitrations are: Philips Petroleum Company v The Islamic Republic of Iran, The National Iranian Oil, Case no. 39 Chamber Two Award No. ITL 11-39-2 (30 December 1982); and AMOCO Iran Oil Co v The Islamic Republic of Iran, the National Iranian Oil Company, The Iranian Offshore Oil and the Iranian Oil Company, Case No. 55, Chamber Two Award No. ITL 12-55-2 (30 December 1982).

¹¹⁵ Paragraph 216 of the Report of the Working Party on the Accession of the Russian Federation to the WTO: 'He noted that the State monopoly on foreign trade had been eliminated by Presidential Decree No. 213 of 15 November 1991 "On Liberalization of Foreign Economic Activity on the Territory of the Russian Soviet Federal Socialist Republic" (as amended on 27 October 1992). This principle was further embodied in Article 1 of the Civil Code and Article 8 of the Constitution.)', WTO Documents: WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011.

Cape Verde,¹¹⁶ which have acceded to the WTO, and Bhutan as a country that is still in the WTO accession process.¹¹⁷

It can also be asserted that there are several other acceded or acceding countries whose constitutions have been amended during or very recent to their accession process. For instance, Albania amended its constitution in 1998 and acceded to the WTO on 8 September 2000; Armenia has a new constitution since 1995 and joined the WTO on 5 February 2003; Georgia had a new constitution in 1995 and its accession dated on 14 June 2000; Kyrgyz Republic's new Constitution was adopted in 1993 and it acceded to the WTO on 20 December 1998. Therefore, if there were any inconsistencies between the domestic law (including the constitution) of these acceding countries with the WTO agreements, they have been removed through the adoption of *inter alia* a new constitution to accelerate the WTO accession.

In some countries, accession to international organizations, such as the WTO, can be approved by a head of state or through his/her direct involvement. Therefore, if there is a conflict between the WTO agreements and the constitution, this usually does not result in a legal impediment to accession. This is because in some countries a head of state's decision can prevail over the domestic law including the constitution. For instance, in the accession of the following acceded countries the head of states were directly involved:

¹¹⁶ Cape Verde's Constitution was promulgated on 7 March 1980. The Constitution was subsequently revised in 1981, 1988, 1992, 1995 and again most recently in 1999. Cape Verde revised its Constitution to redefine the concept of public property to provide a legal framework for market liberalization. In accordance with the revised Constitution and Law No. 93/IV/93 of 15 December 1993, economic sectors were no longer reserved for public activity in order to stimulate the private sector and to promote foreign investment. As a result, more than 20 State-owned enterprises had been privatized. The privatization of these enterprises was undertaken through the sale of shares or the direct sale of the enterprise. The process of liquidation was used in certain cases. See paragraphs 35 and 52 of the Report of the Working Party on the Accession of the Cape Verde to the WTO, WTO Document WT/ACC/CPV/30, 6 December 2007.

¹¹⁷ Over the past three years, Bhutan has addressed Constitutional reform leading to national elections. In addition, there has been staff turnover at the Ministry of Economic Affairs. These factors have affected the pace of Bhutan's accession. See Accession of the Least-Developed Countries to the WTO, 10 March 2009 p. 3, WTO Document: WT/COMTD/LDC/W/44.

Cambodia;¹¹⁸ Jordan;¹¹⁹ Oman;¹²⁰ and Saudi Arabia.¹²¹ Regarding Iran, there are detailed rules on adoption process for international agreements. However, as discussed in chapters three and four, on the basis of the theory of *Velayate Faqih* and under Iran's constitutional system, the Leader can play an important role in removing Iran's impediments to the adoption process for international agreements. For instance, the Principle 110(8) mechanism can be authorized only by the Leader.

An important question that can be raised is whether amending Iran's Constitution can be a practical solution for removing the legal impediment to its WTO accession.

To answer this question, it should be taken into consideration that there is a very difficult, complicated and time-consuming process to amend the Constitution. Under Principle 177 of Iran's Constitution, there are a number of qualifications to revise the Constitution, among which are that:

- revision can take place in 'urgent cases';
- revision shall be started if the Leader approves;
- revision can be started after consultation with the National Expediency Council;
- the result of the revision should be approved by the Leader;
- the result of the revision shall be put to public vote and be approved by the absolute majority of the participants in a referendum;

¹¹⁸ See para. 40 of Report of the Working Party on the Accession of the Cambodia, WTO Document: WT/ACC/KHM/21, 15 August 2003.

¹¹⁹ See para. 34 of Report of the Working Party on the Accession of the Jordan to the WTO, WTO Document: WT/ACC/JOR/33 and WT/MIN (99)/9, 3 December 1999.

¹²⁰ See para. 29 of Report of the Working Party on the Accession of the Oman to the WTO: 'He confirmed that ratification of Oman's accession to the WTO Agreement would be accomplished by His Majesty, the Sultan's signature or his ratification of the signature of a person designated by him. The Majlis Ash-Shura and the Majlis ad-Dawla would have no rôle in the approval or ratification of Oman's accession package.' WTO Document: WT/ACC/OMN/26, 28-09-2000.

¹²¹ See para. 71 of the Report of the Working Party on the Accession of Saudi Arabia to the WTO, 'Article 70 of the Basic Law of Governance and Article 20 of the Board of Ministers Law provide that laws were enacted and amended, and treaties, international agreements and concessions were approved and implemented, by Royal Decrees after having been considered by the Consultative Council and the Board of Ministers, respectively.' WTO Document: WT/ACC/SAU/61, 1 November 2005.

- there are some principles of the Constitution, such as those on Islamic rules, which cannot be revised.

It would be asserted that accession to the WTO – as an important organization on multilateral trade – can be an ‘urgent case’ for Iran to amend its Constitution. However, it can be also argued whether the Constitution needs to be amended in the accession of Iran to each individual multilateral agreement and organization. One of the main characteristics of a constitution is to be immune from frequent amendments on the basis of the daily needs of a developing country, like Iran, in international trade and politics. Therefore, accession to multilateral organizations/agreements cannot be a good instance for ‘urgent cases’. In addition, it should be taken into consideration that Iran still suffers from problems/corruption resulting from the unclear process of concluding some bilateral contracts/agreements and the resolution process of the relevant disputes. That is why removing the requirements of Principle 139 from the Constitution would be harmful to Iran’s national interest.

It bears mentioning that one of the above-mentioned qualifications to amend the Constitution is ‘after consultation with the National Expediency Council (NEC)’. This is because the NEC was established to resolve the disputes on the basis of an inconsistency with the Constitution. If the NEC can remove an inconsistency with the Constitution, such as the one on Iran’s accession to the WTO, no revision of the Constitution would be needed. That is why, as suggested in this chapter, the adoption of the WTO accession protocol by the NEC is a practical solution to remove the legal impediment to Iran’s WTO accession. This is what has been experienced by Iran in the adoption process for international agreements that include an inconsistency with the Constitution. And, so far, this solution, indeed, has worked very well.

Another solution on the basis of the similar experience of other countries in the accession to the WTO is found in the accession of Saudi Arabia to the WTO. As discussed in this chapter¹²², In Saudi Arabia’s accession, there was a ‘negative list’ added to Annex C of Saudi Arabia’s protocol of accession as

¹²² See section 7.3.1.3. (Consensus under WTO Law).

exceptions to Saudi Arabia's trade regime due to the 'preservation of religious values and principles and provision of national security'.¹²³

This 'negative list', including a list of exceptions to trade, was accepted through consensus in the General Council as part of Saudi Arabia's accession protocol. Therefore, this can also be a solution to remove Iran's legal impediment to its WTO accession. The 'Negative List' of Saudi Arabia's protocol of accession can be justified by reference to the 'preservation of religious values'. However, the exception regarding the compulsory jurisdiction of the WTO DSS sought by Iran is on the basis of its 'national security'. Therefore, it can be suggested that, in its accession to the WTO, Iran continues its practice which is recognized at the international level by other countries with regard to its constitutional rules on dispute settlement. Then, if consensus is reached and no objection is declared to the mentioned domestic restrictions, Iran's protocol of accession could be adopted. Otherwise, the solutions based on Iran's domestic legal system, as discussed in this chapter, should be considered. Whether a solution similar to what was used by Saudi Arabia in its accession process would be accepted by WTO Members is beyond the scope of this legal analysis.

7.6. Conclusion

The conflict between Iran's constitutional requirements on dispute settlement with the WTO Dispute Settlement Understanding, as discussed in the previous chapters, is the legal impediment to Iran's accession to the World Trade Organization. To remove this impediment, there are a number of legal¹²⁴ and also pragmatic¹²⁵ solutions that were scrutinized in this chapter and which should be taken into consideration in Iran's accession process.

Recognized as 'mere formality' through Iran's practice, the requirements of the Principle 139 of its Constitution have been enforced in form of

¹²³ Paragraph 57 of the Report of the Working Party on the Accession of Saudi Arabia to the WTO States: "The representative stated that foreign investment was permissible in all activities, except a short "Negative List", which would be revised and shortened periodically.' WTO Document: WT/ACC/SAU/61, 1 November 2005.

¹²⁴ See section 7.3. (Suggestions According to the WTO Law to Observe Principle 139), and also section 7.4. (Suggestions Based on Iran's Domestic Legal System).

¹²⁵ See section 7.2. (Pragmatic Solutions).

reservations, even if the reservation is prohibited by the wording of the treaty itself. So far, there are instances which show that this practice has not been opposed or criticized by other countries.¹²⁶ Accordingly, this practice is likely to be continued by Iran in its accession to the WTO, unless the needed consensus for adoption of the protocol of accession cannot be reached. It is important to point out that, although the legal impediments would not be removed under this solution, the problem of accession would be solved by means of a pragmatic approach. Regarding the legal effects of the mentioned restrictions for another country, although under the WTO Dispute Settlement Understanding participation in a dispute is compulsory for a responding party, there is a case in the WTO in which the United States did not participate in the consultations in *Helms-Burton* dispute, because of US 'national security' considerations. After the European Communities requested the establishment of a panel, the US first blocked the establishment of the panel and, when it was requested by European Communities for the second time, it decided to deny the WTO Dispute Settlement Body's authority to hear the case and claimed that it lacked competence to decide on the US invocation of the 'National Security' exception. However, the US did not invoke the national security exception on the basis of the GATT (Art. XXI) and GATS (Art. XIV bis).¹²⁷ Nevertheless it is unlikely Iran can escape from the compulsory jurisdiction of the WTO DSS on the basis of its 'national security' considerations. It is also discussed that Iran's domestic restrictions on dispute settlement can be negotiated and agreed to be part of its protocol of accession to the WTO only if this protocol can be adopted through consensus in the WTO General Council.¹²⁸

There is also a possibility in the WTO system for a country that wants to postpone or stop its commitments under the WTO agreements with a few WTO Members. This option is provided under the 'non-application clause'. If invoked, it can be applied to the whole agreement, not specific provisions of

¹²⁶ See section 7.3.1.1. (Reservations to Agreements including Dispute Settlement Mechanisms).

¹²⁷ See section 7.2.1. (Non-Compliance with WTO Rules Based on National Security).

¹²⁸ See section 7.3.1.3. (Consensus under WTO Law).

the WTO agreements. Therefore, Iran cannot invoke this opt out to be exempted from the WTO DSS compulsory jurisdiction.¹²⁹

To enforce Principle 139 requirements, Iran usually formulates reservations in its accession to international agreements/organizations. However, as discussed,¹³⁰ this option does not work in Iran's WTO accession. Therefore, other solutions are suggested based on Iran's constitutional system, which can resolve the problem of accession to the WTO. These suggestions are made due to the examples of how these solutions have worked in other similar issues of a number of bilateral and multilateral agreements. Although the mechanism of Principle 112 of Iran's Constitution is more likely to be used for Iran's accession,¹³¹ the method based on Principle 110(8)¹³² is also noteworthy, maybe as a last resort. Under Principle 110(8) of Iran's Constitution, if a conflict arises between Iran's Parliament and the Guardian Council on the Parliament's approval which is in conflict with the Constitution, it can be resolved by the National Expediency Council. In other words, if the Parliament's approval concerning Iran's accession to the WTO is rejected by the Guardian Council because of an inconsistency with the requirements of Principle 139 of the Constitution, this conflict can be sent by the Head of the Parliament to the National Expediency Council to be resolved. Therefore, the National Expediency Council can finalize Iran's accession to the WTO, although it is inconsistent with the Constitution.

Since Iran's National Expediency Council can also reject the Parliament's approval on the WTO accession, another constitutional solution is suggested. Pursuant to paragraph 8 of Principle 110, conflicts can be resolved by the Leader after they are examined in the National Expediency Council. On the basis of this Principle of Iran's Constitution, it can be proposed that, if Iran's accession cannot be approved by the National Expediency Council under Principle 112, it can be sent to the Leader to be resolved. It is important to point out that the method of Principle 112 of Iran's Constitution has been applied to finalize Iran's accession to a number of multilateral treaties and practically has worked very well.

¹²⁹ See section 7.3.2. (Non-Application).

¹³⁰ See section 7.3.1. (Reservation).

¹³¹ See section 7.4.1. (Principle 112).

¹³² See section 7.4.2. (Principle 110 (8)).

There is also a no conflict view which can be supported by some arguments,¹³³ among which the adoption process of Iran-United States Claims Tribunal (Algiers Claims Settlement Declaration) and some instances of other countries experiences were examined. However, due to some specific reasons mentioned in this chapter,¹³⁴ Iran's Government's *blanco* approval approach cannot be followed for the WTO accession.

It was also discussed that, even though some countries have amended their domestic law system – including constitutions – to join the WTO,¹³⁵ it seems very unlikely that Iran will amend its Constitution to remove the requirements of Principle 139. It bears mentioning that, in the accession of Saudi Arabia to the WTO, a 'negative list' as exceptions by reference to the 'preservation of religious values' was added to its accession protocol. This can also be helpful for Iran's accession on the basis of its 'national security' justification, even though determining the level of this flexibility of WTO Members goes beyond the scope of this analysis.

¹³³ See section 7.5. (Suggestions on the Basis of a Practical Interpretation of Principle 139 (No Conflict View)).

¹³⁴ See section 7.5.2. (Iran-United States Claims Tribunal Experience).

¹³⁵ See section 7.5.3. (Similar Experience of Other Countries in Accession to the WTO).

Conclusions, Suggestions and Summary

Introduction

The World Trade Organization was established on 1 January 1995. The main aim for which this organization was established is to remove trade barriers from international trade, including the elimination of discriminatory treatment in international trade relations.¹ There is no doubt that the WTO would be an effective forum for Iran, both for multilateral trade decision making and also hopefully for removing unilaterally imposed unfair and discriminatory economic restrictions. So far, 36 countries have acceded to the WTO. 19 applicants, including Iran, are still in the process of accession.²

Iran's WTO accession application was formally submitted to the WTO Director General in 1996. This request remained on the agenda of subsequent General Council meetings for several years. Finally, on 26 May 2005, a Working Party to examine Iran's application for accession was established and Iran was granted observer status in the WTO.³ In November 2009, Iran submitted its Memorandum on the Foreign Trade Regime to the WTO which was circulated among the WTO Members. The WTO Members' questions on Iran's Memorandum were sent to Iran in 2010. The WTO Working Party on the accession of Iran has not yet met and its Chairman has not yet been appointed by the WTO General Council.⁴ After the Working Party's Chairman is appointed, in parallel with the work undertaken by the Working Party, individual WTO Members will engage with the applicant country (Iran) in bilateral talks on tariff rates and specific market access commitments as well as other trade-related issues. When the bilateral negotiations and the multilateral talks are concluded, the Working Party will send its report and a draft protocol of accession (including lists of Iran's commitments) to the

¹ The Preamble of WTO Agreement.

² See the WTO website, https://www.wto.org/english/thewto_e/acc_e/acc_e.htm, last visited on 1-10-2016.

³ See: http://www.wto.org/english/thewto_e/acc_e/ai_iran_e.htm, last visited on 1-10-2016.

⁴ WTO Accessions 2015 Annual Report by the Director-General, WTO Document: WT/ACC/25, WT/GC/174, WT/MIN(15)/7, 16 November 2015.

General Council. The General Council can only adopt a decision on a country's accession if there is consensus on such accession.⁵

The lack of progress in the accession process of Iran has been due to some domestic and external factors. Difficulties in the liberalization and privatization process of trade and investment at the domestic level, as well as financial restrictions imposed on the basis of political reasons are among the most important elements resulting in Iran's prolonged process of accession. Therefore, there are a number of impediments, such as political, trade, economic, and also legal factors involved in delaying Iran's accession to the WTO. To join the WTO, Iran needs to overcome all existing impediments, including the legal ones. It can be asserted that most non-trade impediments, and in particular those of a political nature, can be resolved over time. Some others can be removed through amending Iran's trade system. However, there are a few legal barriers which cannot easily be removed. The main focus of this dissertation is on a very important legal impediment regarding the conflict between the WTO dispute settlement system and Iran's Constitution, and how this legal impediment, can be removed.

Research Questions and Conclusions

Three research questions were examined in this dissertation. The first research question was whether there is a legal conflict between the WTO DSU and Iran's constitutional system that can impede Iran's accession to the WTO. To answer to this question, the WTO accession process and the WTO's general obligations as well as the difficulties encountered by Iran in this respect have been discussed. Pursuant to Article XVI:4 of the WTO Agreement, to join the WTO, Iran must ensure the conformity of all its laws, regulations and administrative procedures with the WTO multilateral agreements. However, as noted, there is a possible inconsistency in Iran's constitutional system with WTO law. Iran's Constitution includes some restrictions on the referral of disputes to international dispute settlement systems. Principle 139 of Iran's Constitution states:

⁵ For further information see the World Trade Organization internet site at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm, last visited on 1-10-2016.

Resolving the litigation related to public and state property or referring it to arbitration is contingent, in each case, upon the approval of the Council of Ministers, and must be communicated to the Assembly. In cases where the party to the dispute is a foreigner and in important internal cases, it must also be approved by the Assembly. The law determines the important cases.

Under this constitutional requirement, to refer a public and state property dispute to international dispute settlement systems, an authorization from the Government⁶ and the Parliament⁷ shall be obtained. This requirement is to protect public and state property. This protection can be applied by the Parliament in the form of a supervisory mechanism, to avoid any corruption in resolving state and public disputes, for instance through a mutually agreed solution. Therefore, first it was examined in this dissertation whether this constitutional requirement is inconsistent with the WTO and then how this inconsistency can impede Iran's accession to the WTO.

One of the important characteristics of the WTO dispute settlement system (DSS) is its compulsory jurisdiction, which means that the parties to a dispute do not need to agree on the jurisdiction of the DSS. Therefore, if a WTO Member brings a complaint regarding a WTO covered agreement to the DSS, the respondent must agree to enter into consultations. If it refuses to do so, then the complainant can immediately request the establishment of a panel – which the respondent will not be able to block. In other words, if there is a dispute taken to the WTO DSS against Iran, under the compulsory jurisdiction of the WTO DSS, Iran as a responding party cannot escape this jurisdiction. However, under Principle 139 of Iran's Constitution, to participate in a dispute concerning public or state property, Iran needs an

⁶ For further information on the tasks and powers of Iran's Government see chapter 3, section 3.5.3. (Executive). For the Government's role in international agreements adoption process see chapter 4, section 4.3.2. (Negotiation and Signature by the Government).

⁷ For further information on the powers and tasks of Iran's Parliament see chapter 3, section 3.5.4.1. (Parliament). For the Parliament's role in adoption process of international agreements see chapter 4, section 4.3.3. (Parliament's Approval in the Accession Process).

authorization from its Parliament.⁸ Therefore, Iran cannot participate in a WTO dispute if its Parliament does not authorize this participation. This is in conflict with the WTO DSS compulsory jurisdiction.

Therefore, there is a legal conflict between WTO DSU and Iran's constitutional system resulting from the inconsistency between Iran's Principle 139 requirement on dispute settlement and the compulsory jurisdiction of the WTO DSS. How this inconsistency can impede Iran's accession has also been examined in this dissertation. It bears considering that if Iran can opt out of the WTO DSU because of being inconsistent with its Constitution, there would not be such a legal impediment to its accession.

Regarding how this legal inconsistency can impede Iran's accession, it should be taken into consideration that the 'single-undertaking principle' stated in Article II:2 of the WTO Agreement does not let Iran opt out of any WTO multilateral agreement, including the DSU. Under Article II:2 of the WTO Agreement, Iran must accept all WTO multilateral agreements. It bears mentioning that, after Iran's protocol of accession is adopted by the WTO General Council, there is also an international agreement adoption process in Iran to be followed. Under this process, the protocol shall be adopted by the Parliament after it is adopted by the Government. If an international agreement is inconsistent with the Constitution, either the Government or the Parliament can formulate a reservation to avoid unconstitutionality. However, as no reservation to the DSU is possible, according to Iran's Guardian Council's⁹ view,¹⁰ a reservation to the DSU would also not be authorized under Iran's legal system. Therefore, due to the inconsistency between Principle 139 of Iran's Constitution and the WTO Dispute Settlement Understanding (DSU),¹¹ if the Parliament adopts Iran's accession

⁸ It bears mentioning that, under Principle 139 of Iran's Constitution, the authorization of the Government is also required but this will not be problematic.

⁹ The Guardian Council checks the constitutionality of the Parliament's approvals. For further information on this Council see chapter 3, section 3.5.4.2. (Guardian Council). For the Council's role in international agreements adoption process see chapter 4, section 4.3.4. (Who Checks the Constitutionality in Accession Process?).

¹⁰ This view is mentioned below and also in chapter 4, section 4.4.2. (What is the Reasoning of the Guardian Council When There is a Conflict with Principle 139?).

¹¹ The WTO DSU: Understanding on Rules and Procedures Governing the Settlement of Disputes.

protocol, the Guardian Council will send it back to the Parliament (to remove the inconsistency) on the basis of the constitutionality review. This can block Iran's accession to the WTO.

To conclude, the answer to the first research question reached in this dissertation is: there is a legal impediment to Iran's accession to the WTO which results from the conflict between Principle 139 of Iran's Constitution and the WTO DSU.

The second research question addressed in this dissertation was whether this conflict can be removed through legal interpretations of the Constitution or current legal practice.

To answer this question, the literal, historical, authentic, systemic, teleological, and doctrinal interpretations of Principle 139 of Iran's Constitution were examined. However, a no conflict view¹² cannot sufficiently be supported by this examination.

Under the interpretation of Principle 139¹³ that was issued by the Guardian Council, the requirements of this Principle do not apply to judicial dispute settlement mechanisms. Therefore, if the WTO DSS is a judicial system, there would be no conflict. However, as it was discussed in chapter two,¹⁴ the WTO DSS contains several dispute settlement mechanisms including consultations, panel and Appellate Body proceedings (adjudication), arbitration, good offices, conciliation and mediation. The WTO DSS is an exceptional system which includes almost all advanced and traditional/political (diplomatic) and legal methods of dispute settlement. Unlike other dispute settlement systems, WTO Members can enjoy a mix of arbitration and adjudication methods during the proceedings of a dispute, which is unique and distinguishes it from other international dispute settlement systems. Therefore, the DSS has a quasi-judicial nature and can therefore be in conflict with the requirements embodied in Principle 139 of Iran's Constitution.

¹² The no conflict view is shortly mentioned below and also in chapter 5, section 5.4.2. (No Conflict View).

¹³ Interpretation No. 7484 dated 01-01-1987

¹⁴ See chapter 2, section 2.3.7. (Quasi-judicial).

It bears mentioning that, under the systemic interpretation, in joining international agreements, Iran's Government sometimes has used a different approach from the 'case-by-case approval approach' that is required by Principle 139. For instance, in the adoption process of the 'Single Article Act Concerning the Settlement of the Financial and Legal Disputes of the Government of Islamic Republic of Iran with the Government of the United States of America (1981)', Iran followed a '*blanco* approval approach'.¹⁵ This approach is different from the 'case-by-case approval approach' required by Principle 139.

As it was discussed in this dissertation,¹⁶ in the adoption process of the aforementioned 'Single Article Act', the Government convinced the Parliament (and the Guardian Council) that in the referral of disputes to Iran-United States Claims Tribunal, the 'case-by-case approval approach' will be followed. However, this never happened because, in two disputes,¹⁷ the Tribunal did not recognize Iran's domestic law restrictions (including Principle 139). This was, as it is stated by the Tribunal, because the restrictions had not been notified to the parties before consenting to the *Algiers Declarations*. In other words, the requirements of Principle 139 were not accepted on the basis of the 'good faith' principle. The Government's '*blanco* approval approach', as adopted with regard of the 'Single Article Act', has not been recognized by Iran's constitutional institutions, but has been considered by the Parliament as resulting in non-compliance with Principle 139 of the Constitution and has

¹⁵ Under the '*blanco* approval approach', as has been discussed in chapter 5, section 5.2.1.2. (Legal Issue (2): Case-by-Case Approval Approach or Blanco Approval Approach), the Government does not implement the case-by-case approval approach which is stated by Principle 139. In other words, if an agreement including dispute settlement mechanisms is adopted by the Parliament, the case-by-case authorization for the referral of disputes to a dispute settlement system will not be requested from the Parliament.

¹⁶ See chapter 6, section 6.3.2. (Iran-United States Claims Tribunal and Principle 139 Requirements).

¹⁷ Philips Petroleum Company v The Islamic Republic of Iran, The National Iranian Oil, Case no. 39 Chamber Two Award No. ITL 11-39-2 (30 December 1982); and the AMOCO Iran Oil Co v The Islamic Republic of Iran, the National Iranian Oil Company, The Iranian Offshore Oil and the Iranian Oil Company, Case No. 55, Chamber Two Award No. ITL 12-55-2 (30 December 1982). For further information, see chapter 6, section 6.3.2.1. (The Iran-United States Claims Tribunal and Principle 139).

been referred to the courts. The reaction of the Iran-United States Claims Tribunal to Iran's domestic restrictions has, in a few instances, been followed by other international tribunals, either on the basis of the 'good faith' principle or an emerged 'international public order'.¹⁸ This, however, cannot remove the discussed legal impediment to Iran's accession to the WTO. This is because, in adopting Iran's WTO accession protocol, only Iran's adoption process rules will be observed.

To conclude, the answer to the second research question reached in this dissertation is that the legal impediment resulting from the conflict between Iran's Constitution and the WTO DSU cannot be removed through legal interpretations of Principle 139 or current legal practice.

-The third research question addressed in this dissertation was how the legal impediment to WTO accession resulting from Principle 139 of Iran's Constitution can be removed.

To answer to this question it must be taken into consideration that, as there are two different problems (stated below),¹⁹ different solutions have also been examined. The focus of this dissertation is to recognize the legal impediment to Iran's WTO accession resulting from Principle 139 of Iran's Constitution and to remove it.²⁰ However, there is another issue involved in this question which was also discussed in this dissertation. The first issue regarding the legal impediment is the result of a conflict between Principle 139 and the WTO DSU. To remove this impediment, there are several solutions suggested in chapter seven. However, the second issue relates to Iran's post-accession phase. When dispute settlement proceedings are initiated against Iran under the WTO DSS and to comply with Principle 139 requirement, Iran will make its participation conditional on its authorization by the Parliament.

¹⁸ For instance see: the arbitration award no. 3896 of 1982 on the Framatome v. Atomic Energy Organization of Iran; and the arbitration award no. 4381 of 1986 on an Iranian State company and a French company. For further information, see chapter 6, section 6.3.1. (International Arbitrations).

¹⁹ The first problem is to remove the legal impediment to Iran's accession to the WTO. And the second problem regarding after accession is how the conflict between the DSS compulsory jurisdiction and Iran's Principle 139 requirement can be resolved.

²⁰ The title of this dissertation is: 'The WTO Dispute Settlement System as a Legal Impediment to Iran's Accession to the WTO.'

Although this issue is not the main focus of the topic of this dissertation, some suggestions have been made as to how this issue could be addressed.

Suggestions to remove the legal impediment to Iran's WTO accession (A. Solutions for the first issue) and also suggestions to resolve the conflict (post-accession) between Iran's Constitution and the WTO DSU (B. Solutions for the second issue) are presented below.

A. Solutions for the First Issue (the Legal Impediment to WTO Accession)

In responding to the third research question of this dissertation on removing the legal impediment for Iran's WTO accession, there are several suggestions discussed in this dissertation that are briefly mentioned below.

I. No Conflict View

Under the no conflict view,²¹ domestic law restrictions, such as Iran's Principle 139 requirements, do not influence Iran's accession to the WTO. This is due to a number of reasons. Some of which are presented below:

- changes of time;
- the development of mechanisms in international and multilateral dispute settlement systems;
- international public order and practice (domestic restrictions such as Principle 139 requirements are not accepted by international tribunals);
- achieved purposes of Principle 139 requirements stated by Iran's legal system (on avoiding corruption in dispute settlement).

Even though these reasons would be accepted by international tribunals, legally speaking, Iran's WTO accession protocol should be adopted by Iran's Parliament. This adoption process also requires a constitutionality review, which will result in a legal impediment to the accession (on the basis of the conflict between Principle 139 of Iran's Constitution and the WTO DSU). It bears considering that the constitutionality review by Iran's Guardian Council is performed on the basis of neither national interest, nor whether the requirements are still needed in international dispute settlement. To

²¹ This view is discussed in chapter 5, section 5.4.2. (No Conflict View).

remove this legal impediment, as long as the Constitution is not amended, anything inconsistent with the Principle 139 requirements will be recognized by the Guardian Council as unconstitutional. Therefore, the no conflict solution cannot remove the legal impediment to Iran's WTO accession resulting from Principle 139.

II. Amendment to the Constitution

To join the WTO, as discussed in chapter seven,²² some countries have amended their constitutions. However, the amendment process of Iran's Constitution is very complicated and troublesome. To amend the Constitution, there are a number of qualifications and requirements that have to be met.²³ In addition, there are still some national concerns requiring effective parliamentary supervision to avoid corruption in concluding international contracts/agreements and their dispute resolution process. Furthermore, to join each international agreement, Iran cannot amend its Constitution to remove the inconsistencies between each international agreement and its constitutional system. Therefore, amending Iran's Constitution as a solution to remove the legal impediment to Iran's WTO accession cannot easily be achieved.

III. Principle 112 Method²⁴

Under this method, after Iran's WTO accession protocol is adopted by the Parliament, it shall be checked by the Guardian Council for constitutionality. Due to being inconsistent with the Constitution (the conflict between Principle 139 requirements and the WTO DSS compulsory jurisdiction) the protocol will be sent back to the Parliament. However, as the inconsistency cannot be removed by the Parliament, this will result in a dispute between the Parliament and the Guardian Council and can block the adoption process.

To resolve this dispute, under Principle 112, Iran's protocol of accession to the WTO can be sent to the National Expediency Council (NEC)²⁵ to be adopted.

²² See section 7.5.3. (Similar Experience of Other Countries in Accession to the WTO).

²³ See *ibid*.

²⁴ This method is discussed in chapter 7, section 7.4.1. (Principle 112).

The NEC discusses the protocol of accession through its committees and sub-committees and then can adopt it by a majority vote. So far, there are a number of bilateral and multilateral agreements that have been adopted by the NEC despite an inconsistency with the Constitution. It bears mentioning that the NEC's decision on the adoption of bilateral and multilateral agreements is not temporal, which means that the decision on the adoption of international agreements is final and is not limited to a short period of time.²⁶

This method is the best practical solution to remove the legal impediment to Iran's accession to the WTO. If the NEC does not adopt Iran's WTO accession, there is also another method under Principle 110 presented below.

IV. Principle 110 (8) Method²⁷

Principle 110 (8) states that an issue that cannot be settled by ordinary means can be resolved by the Leader through the National Expediency Council. Therefore, this method requires the direct involvement of Iran's Leader.²⁸

If Iran's protocol of accession to the WTO cannot be adopted via the Principle 112 method, it can be requested from the Leader, for instance by the Head of the NEC, to refer the matter to the NEC. If the Leader agrees, the NEC can discuss and agree to Iran's accession. Then, if the result (WTO accession) is adopted by the Leader, Iran can join the WTO.

²⁵ For further information on the NEC see chapter 3, section 3.5.5. (National Expediency Council). For NEC's role in international agreements adoption process see chapter 4, section 4.3.5. (The Role of the National Expediency Council in the Accession Process).

²⁶ It bears mentioning that, according to the Guardian Council's view, the National Expediency Council's decision on resolving disputes under Principle 112 (except for adopting international agreements) is temporal and, after the necessity for taking that decision (on issues that are inconsistent with the Constitution) is removed, the Parliament can amend the NEC's decision. For further information, see chapter 3, section 3.6.4.2. (Important Questions on the National Expediency Council), and also chapter 5, section 5.4.3. (National Interest and the Parliament, Guardian Council and the NEC).

²⁷ This method is discussed in chapter 7, section 7.4.2. (Principle 110 (8)).

²⁸ For further information on the tasks and powers of Iran's Leader see chapter 3, section 3.5.1 (The Leader (Under Iran's Constitution)). For the Leader's role in international agreements adoption process (including the WTO accession protocol) see chapter 4, section 4.3.6. (The Leader's Role in the Accession Process).

There are some differences between this method and the Principle 112 method. First, under this method, the protocol of accession does not need to be referred to the NEC as a result of a dispute between the Parliament and the Guardian Council. If, from the beginning, the protocol is viewed by the Leader as an issue that cannot be adopted through the conventional methods (by the Parliament or even by the NEC under Principle 112) it can be referred to the NEC to be adopted under Principle 110 (8). Therefore, it is shorter than some other methods.

Another difference is that the adoption process under this method, in addition to the NEC's decision, requires that the protocol of accession is also adopted by the Leader.

The third difference is that, under the Principle 112 method, the NEC cannot adopt the protocol of accession if it is inconsistent with Islamic principles.²⁹ However, under Principle 110 (8), the Leader, as the *Valiye Faqih*,³⁰ can adopt the protocol if it is inconsistent with Islamic principles. This would be helpful if Iran's protocol of accession includes inconsistency with Islamic principles, for instance with regard to certain obligations under the TRIPS Agreement³¹ or the DSS non-Muslim judges.³²

It bears considering that so far no multilateral or bilateral agreement has been adopted under this method.

²⁹ This is due to the interpretation that has been issued by the Guardian Council: interpretation number 4575 dated 24 May 1993 which was issued on Principle 112 of Iran's Constitution. For detailed information see the Guardian Council's website on interpretations at: <http://www.shora-gc.ir>, last visited on 1-10-2016.

³⁰ For further information regarding the *Valiye Faqih* see chapter 3, section 3.4.1.1. (Islamic sovereignty) and section 3.5.1 (The Leader (Under Iran's Constitution)).

³¹ Iran is not a Member of Berne Convention due some difficulties of its domestic system for protection of copyright and related rights. Article 9 (1) of the TRIPS Agreement states: 'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto'.

³² Regarding non-Muslim judges see chapter 3, section 3.6.5. (Non-Muslim Judges and Iran's Legal System).

B. Solutions for the Second Issue (the Post-Accession Legal Conflict)

The main focus of the research questions addressed in this dissertation is on the legal impediment to Iran's WTO accession resulting from Principle 139 of Iran's Constitution and how to overcome this impediment. However, there is also another issue resulting from the conflict between Principle 139 and the WTO DSU. This issue may arise in the post-accession phase. This issue is further clarified below.

As discussed, Iran's protocol of accession can be adopted if the legal impediment which is discussed in this dissertation is removed, for instance, through the adoption of National Expediency Council. Then it can be asserted that the problem of accession is temporarily removed.

However, in the post-accession, if dispute settlement proceedings are initiated by a WTO Member under the WTO DSS against Iran, due to the compulsory jurisdiction of the WTO DSS, Iran will have no choice but to participate in these proceedings. However, what if, to comply with the Principle 139 requirements, Iran's Government requests an authorization from the Parliament and the Parliament does not authorize Iran's participation. It bears noticing that under Iran's Constitution, the constitutional institutions, such as the Parliament and the Guardian Council even after the accession can still block Iran's participation in the DSS procedures. Therefore if the participation is not authorized, the Government will not have the required legal capacity to participate. And if the Government lacking the required capacity participates, under Iran's legal system, there would be considerable problems resulting from the non-recognition and lack of legal capacity consequences for the WTO DSS rulings. In other words, if Iran's legal system does not recognize the rulings, they cannot be enforced by Iran's constitutional institutions. For instance, Iran's Parliament cannot amend or change legislation which is considered by the WTO DSS as inconsistent with the WTO agreements. Therefore, legally speaking, the question is whether removing the legal impediment to Iran's WTO accession through the suggested solutions in this dissertation can resolve the conflict between Iran's Constitution and the compulsory jurisdiction of the WTO DSS. In other words, the question is whether this legal impediment can be really removed through solutions, such as the Principle 112 method? And whether in the post-accession, the problem of the above-mentioned legal conflict will remain and

it would result into complicated issues on recognition and enforcement of the WTO DSS rulings by Iran's legal system?

To answer this question, it bears mentioning that, if an international agreement providing for a dispute settlement system is approved by the NEC, Iran's Government usually does not request the Parliament for authorization on a case-by-case basis to use the dispute settlement system provided for in the approved agreement. More importantly, so far, to the knowledge of the author, Iran's Parliament has never rejected any request for the referral of state and public property disputes to dispute settlement systems regarding those international agreements which are adopted by the Parliament. However, if Iran's Government enforces the Principle 139 requirements and the Parliament does not authorize the participation, then the complainant can immediately request the establishment of a panel – which the respondent (Iran) will not be able to block. However, it is doubtful whether the result of this dispute, for instance to remove or amend a parliamentary legislation, can be legally recognized in Iran's legal system (and by Iran's constitutional institutions).

Another solution regarding this issue for Iran is to follow the 'example' set by the United States in the *US – Helms-Burton* dispute. On 3 March 1996, the European Communities requested consultations with the United States under the WTO DSS and, when it could not resolve the issue, requested the Dispute Settlement Body (DSB) to establish a Panel on 20 November 1996. The United States first blocked the establishment of a Panel requested by the European Communities, then, after the Panel was requested for the second time, the US refused to recognize the jurisdiction of the Panel. On 11 April 1997, the parties to the *US - Helms-Burton* dispute agreed to suspend the proceedings of the WTO Panel through a Memorandum of Understanding. This suspension continued until the Panel's jurisdiction lapsed on 22 April 1998. The reason given by the United States for refusing to recognize the jurisdiction of the Panel was that this dispute related to its national security.³³

³³ For further information see chapter 7, section 7.2.1.1. (Helms-Burton Act).

Therefore, non-participation in a WTO dispute on the basis of national security could be a suggestion if other WTO Members do not contest it.³⁴

Since refusing to recognize the DSS jurisdiction on the basis of national security would not be a practical solution for Iran, a suggestion on the basis of the other countries' WTO accession experience is also discussed. In the context of the accession of Saudi Arabia to the WTO, WTO Members agreed by consensus to a so-called 'Negative List', which was added to Annex C of Saudi Arabia's protocol of accession. This Negative List contains exceptions from WTO obligations granted to Saudi Arabia to allow for the 'preservation of religious values and principles and provision of national security'.³⁵ If WTO Members would agree by consensus to include in Iran's protocol of accession a provision allowing Iran to set aside the compulsory jurisdiction of the WTO DSS, there would obviously no longer be a post-accession conflict between Principle 139 of Iran's Constitution and the WTO DSU. However, it is most unlikely that WTO Members will agree on such exception from such a core provision of the WTO legal system, i.e. the compulsory jurisdiction of its DSS.

To conclude, Iran's legal impediment to WTO accession resulting from Principle 139 of Iran's Constitution can be removed and, therefore, Iran can join the WTO. To remove this legal impediment, there are several solutions discussed. The best practical solution would be to adopt Iran's protocol of accession through the National Expediency Council (the Principle 112 method). Then, there would not be such a legal impediment to the accession of Iran to the WTO.

³⁴ The position taken by the US in the *Helms-Burton* dispute was highly contested by other WTO Members.

³⁵ For further information see chapter 7, section 7.5.3. (Similar Experience of Other Countries in Accession to the WTO).

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Valorisation Addendum

What is the social (and/or economic) relevance of your research results (i.e. in addition to the scientific relevance)?

In joining a multilateral organization, developing countries are usually expected to take steps, such as amending/changing their legal domestic system, similar to those that have been taken by developed countries. Sometimes the requirements for joining multilateral organizations can be very costly for applicants. In acceding to the World Trade Organization a country is expected to bring its laws and regulations into compliance with the WTO agreements. If there is any inconsistency between the domestic law and the WTO agreements, the inconsistency should be removed as a precondition to join the WTO. Although countries, and especially developing countries, acceding the WTO may benefit from transitional periods and capacity building support, they may in order to secure their accession also have to accept obligations that go beyond (WTO-plus obligations) and rights that do not extend as far as (WTO-minus rights) those set out in the WTO agreements. This is not very different from some other multilateral agreements whether on economic, cultural or other important matters. For example, to join the WIPO agreements, a low-income country, which does not have any economic interest in the protection of intellectual property rights, is nevertheless required to amend its legal system to protect these rights. Some WTO countries which removed inconsistencies in their domestic legal system to be able to accede to WTO agreements, such as the TRIPS Agreement, have faced complicated compliance issues after accession. Efforts to remove WTO inconsistencies in domestic law when joining the WTO do not always result in full compliance with the WTO agreements. In some instances removing trade barriers cannot be achieved but through long-term economic and cultural action plans and should be achieved through recognised mechanisms and solutions available in the domestic legal system.

Regarding Iran's accession to the WTO, my research has identified and discusses a fundamental legal impediment to Iran's WTO accession, namely the conflict between Iran's constitutional requirement on state and public property dispute resolutions and the compulsory jurisdiction of the WTO dispute settlement system. My research examines the origin of this impediment, including the legal interpretations of the rule containing the

impediment and the reason why this rule was formulated. It informs that the rule containing the impediment was intended to avoid corruption regarding public and state properties. Therefore, if this impediment were to be removed, the national interest of Iran would be at risk. The suggested solutions are based on Iran's constitutional system and will enable it to join the WTO while preserving its national interest. Therefore, these solutions can resolve Iran's WTO accession problem, without sacrificing the rule which can play a key role in corruption prevention regarding public and state property dispute settlements.

To who, in addition to the academic community, are your research results of interest and why?

My research can be relevant to those countries that seek to join multilateral agreements/organizations, such as the WTO. My research suggests that solutions based on, and respecting, the legal system of the acceding country may be available and should always be given sufficient consideration.

It bears mentioning that the results of my research can also be useful to those organizations/countries which are negotiating with Iran to resolve important problems in international or regional fields, such as nuclear proliferation and human rights issues.

Into which concrete products, services, processes, activities or commercial activities will your results be translated and shaped?

My research will be published as a book. An electronic version will also be published. It is my hope that this book will be translated into Farsi.

It bears mentioning that some parts of my research may also be disseminated to a wider public as stand-alone publications. This could be the case for the chapters on Iran's accession to the WTO, Iran and the WTO dispute settlement system, Iran's constitutional institutions and division of power, Iran's multilateral agreements adoption process rules, legal interpretations of Iran's constitutional requirements on state and public property dispute settlement and the Iran-United States Claims Tribunal.

To what degree can your results be called innovative in respect to the existing range of products, services, processes, activities and commercial activities?

The approach used in my research is innovative because it is based on the examination of mechanisms taken from both multilateral and domestic systems. These mechanisms identify solutions to remove the inconsistencies between multilateral agreements and domestic law considering also the national interest and domestic benefits on which the laws containing inconsistencies have formed. In addition to an international perspective, my research is presenting a domestic approach to resolving issues of Iran in international law, including Iran's WTO accession issues.

How will this/these plan(s) for valorisation be shaped? What is the schedule, are there risks involved, what market opportunities are there and what are the costs involved?

The results of my research can be used by international negotiators regarding international law issues including Iran's accession to the WTO. They can also be taken into consideration for resolving issues regarding Iran and international law generally.

Curriculum Vitae

Siamak Amoozeidi was born on 8 June 1970 in Esfahan, Iran. He holds a Master degree in International Law from the University of Allameh Tabatabaei, Tehran, Iran and a bachelor's degree of Law (Judicial Sciences) of Qom University, Qom, Iran.

He was the Director of the Legal Committee of the Guardian Council's Research Center, Legal Advisor to the Legal Division of the Oil Ministry of Iran, Legal Advisor to the Center of International Law Affairs (CILA), Tehran, Iran, and he was a member of the National Expediency Council's Legal and Judicial Sub-Committee.

He has conducted research on Iran's national strategies for human rights, crime prevention, judicial independence, public international law, international organizations and controlling illicit drugs. He has also been involved in the dispute settlement of Iran's constitutional institutions on several issues, such as family law (divorce and custody) and bilateral agreements on judicial assistance. Since 2011, he has been working with some European companies negotiating with Iranian governmental/private institutions on various industrial investments.

Siamak started his PhD research in 2008 at the Institute for Globalization and International Regulation (IGIR), the International and European Law Department, Law Faculty of Maastricht University and the Ius Commune Research School in the Netherlands.

Siamak can be reached at amoozeidi@gmail.com